In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-172

DON BURGESS CONSTRUCTION CORPORATION, d/b/a BURGESS CONSTRUCTION and DONALD BURGESS and VERLON HENDRIX d/b/a V&B BUILDERS,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and SEQUOIA DISTRICT COUNCIL OF CARPENTERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioners, Don Burgess Construction Corporation, d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V&B Builders, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing an order of the National Labor Relations Board (hereinafter the "Board") against Petitioners herein, which order requires Petitioner Burgess Construction, *inter alia,* to give retroactive effect to a collective bargaining agreement and to bargain with Intervenor herein, Sequoia District Council of Carpenters (hereinafter the "Union").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 596 F.2d 378 and appears at Appendix A, *infra*, pages A-1 to A-22. The Judgment of the Court of Appeals appears at Appendix B, *infra*, pages B-1 to B-10. The Decision and Order of the National Labor Relations Board is reported at 227 NLRB 765 and appears at Appendix C, *infra*, pages C-1 to C-13. The Decision of the Administrative Law Judge is reported at 227 NLRB 768, and appears at Appendix D, *infra*, pages D-1 to D-32.

JURISDICTION

The Opinion of the Court of Appeals was entered on May 4, 1979; and its Judgment was filed on June 8, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a conflict exists between the National Labor Relations Board's application of the "single employer" doctrine and this Court's *H. K. Porter* doctrine, which legal doctrine shall apply to the attempted enforcement of a collective bargaining agreement against a separate legal entity allegedly part of the "single employer" in the absence of any finding that such separate legal entity has agreed to, signed or assumed said agreement, and where the Board has affirmatively found that such separate legal entity had expressly refused to sign or agree to said agreement?

2. In the absence of express statutory provision, does the so-called doctrine of "fraudulent concealment" void Section 10(b) of the National Labor Relations Act? If so,

does such doctrine apply where the party alleging "fraudulent concealment" had knowledge of the facts giving rise to the unfair labor practice charge more than six months prior to the filing of said charge?

3. Does this Court's *Peter Kiewit* doctrine require a finding as to the existence or nonexistence of separate bargaining units in separate legal entities before the National Labor Relations Board may impose a single duty to bargain based upon a finding of "single employer" status?

4. Does the preclusion of "newly-discovered evidence" which would materially alter the decision of the National Labor Relations Board constitute a denial of due process in the absence of a finding that such "newly-discovered evidence" was available to Petitioners at trial?

STATEMENT OF THE CASE

On October 15, 1975, and January 30, 1976, the Union filed unfair labor practice charges under the National Labor Relations Act (hereinafter the "Act") which resulted in a complaint being issued by the Board's Regional Director. Following a hearing on the complaint, the Administrative Law Judge found, *inter alia*, that Burgess Construction and V&B Builders were a "single employer"; that a collective bargaining agreement signed by V&B Builders in August 1974, covering that company's carpentry employees, was retroactively binding on Burgess Construction, despite Burgess Construction's refusal to sign the agreement prior to V&B's having signed it; and that when, in January 1975, Burgess Construction hired a carpentry crew of its own, it was required to apply the terms of the V&B Builders contract to its new employees. The Administrative Law Judge found that Burgess Construction's use of non-

union carpentry employees constituted a violation of the V&B Builders contract and was an unfair labor practice (D. 4, 5).[1]

Upon review of the case, the Board found that Burgess Construction had told the Union, in August and October 1974, that it would not employ carpenters and that such statements constituted "fraudulent concealment" of Burgess Construction's subsequent contract violation by hiring carpenters in January 1975. The Board affirmed the Administrative Law Judge's findings of unfair labor practices; summarily denied a motion by Petitioners to reopen the record for the purpose of presenting newly-discovered evidence; and, *inter alia*, ordered Burgess Construction to give retroactive effect to V&B Builders' contract with the Union (C. 5-6, 9).

Upon the Board's application to the Court of Appeals for the Ninth Circuit, that Court enforced the Board's Order.

REASONS FOR GRANTING THE WRIT

The questions in the instant case are of crucial importance to Petitioners and to other employers who are or who may become subject to the jurisdiction of the National Labor Relations Board. Petitioners are raising novel and important issues, applicable to any company in any industry. The Board's order expands its "single employer" doctrine so far that it contravenes and overrules, *de facto*, this Court's decision in *H.K. Porter Company v. National*

[1]References designated "A", "B", "C" or "D" refer to the Appendices attached to this Petition. "R" references refer to the official record before the Ninth Circuit Court of Appeals.

Labor Relations Board, 397 U.S. 99 (1970) and nullifies the parties' *freedom of contract*, one of the most fundamental policies contained in the National Labor Relations Act. In addition, this case involves a finding that the Act's six-month statute of limitations is inoperative based on the "fraudulent concealment" doctrine, where the aggrieved party admittedly had knowledge of the alleged violation of the Act more than six months prior to filing a charge. Moreover, in the instant case, the Board has disregarded this Court's decision in the *Peter Kiewit* case and the Board's application of that decision on remand, by failing to address the critical issue of whether Burgess Construction's employees constitute an appropriate bargaining unit separate from the employees of V&B Builders.

The importance of these issues and their ramifications should compel a Supreme Court resolution of them.

A. There Is A Clear Conflict Between The Board's Application Of The Single Employer Doctrine, Enforced By The Decision Of The Court Of Appeals, And This Court's Decision In H.K. Porter Company v. NLRB.

One of the fundamental policies of the National Labor Relations Act is freedom of contract, and the Board exceeds its statutory authority when it imposes upon a party a contract to which it did not agree. *H.K. Porter Company v. National Labor Relations Board, supra.* In this case, the Board not only disregarded the teaching of *H.K. Porter*, but also disregarded its own prior position applying the *H.K. Porter* rationale. *A-1 Fire Protection, Inc.*, 233 NLRB No. 9 (1977). See also, *B&B Industries, Inc.*, 162 NLRB 832 (1967).

In August 1974, Burgess Construction refused to sign a union collective bargaining agreement covering its carpentry employees, but V&B Builders subsequently executed the agreement. At the time Burgess Construction refused to sign the contract, it informed the Union that it no longer employed carpenters. Subsequently, in October 1974, Burgess Construction informed the Union by letter that it was not signatory to the Union's agreement, and in a subsequent telephone conversation, Donald Burgess informed the Union that all of the carpenters were on V&B's payroll and that Burgess Construction would not be employing carpenters. In January 1975, over six months after V&B had entered into the Union agreement, Burgess Construction hired a carpentry crew of its own and did not apply the terms of the V&B agreement to its (Burgess Construction's) new crew (D. 4, 5).

The Board found that Burgess Construction and V&B Builders constituted a "single employer" under the Act, and that the carpentry employees of both companies constituted "an appropriate unit." Relying on these legal conclusions, the Board held that Burgess Construction was bound to the contract to the same extent as V&B; that by violating the terms of the V&B contract, Burgess Construction had violated Sections 8(a)(1) and (5) of the Act; and that Burgess Construction must retroactively give effect to the contract *as if it had signed it in the first instance* (C. 2).

In this case, the Board has expanded for the first time its "single employer" doctrine to such an extent that it clearly conflicts with this Court's decision in *H.K. Porter Company v. National Labor Relations Board, supra,* and

has overridden the parties' fundamental right of freedom of contract which is an integral part of the national labor policy.

B. The Doctrine Of "Fraudulent Concealment" Is Inapplicable For Purposes Of Tolling The Section 10(b) Statute Of Limitations.

Section 10(b) of the Act prohibits finding an unfair labor practice based upon facts occurring more than six months prior to the filing of a charge. There is no provision in the Act which sets forth expressly, implicitly or inferentially an exception to this prohibition.

In the instant case, the Board found that Burgess Construction committed an unfair labor practice in January 1975 by employing nonunion carpenters in violation of the terms of V&B's contract with the Union. The Union admittedly had specific knowledge of this fact in late March 1975, but did not file a charge until October 15, 1975, *over ten months* following Burgess Construction's supposed violation of the contract, and over *six months* after the Union first obtained knowledge thereof (D. 2, 14, 20).

This Court has never specifically addressed the issue of "fraudulent concealment" and its application to Section 10(b) of the Act. It is unequivocally clear that there is no language in Section 10(b) which provides in any way for such an exception. Essentially, what had happened is that the Board and the Court of Appeals have created an "equitable" exception which was never addressed by Congress. Since decisions of both the Board and the Court of Appeals in this case clearly conflict with the language of Section 10(b), it is imperative that this Court address the

issue of "fraudulent concealment" so that employers and labor unions may know whether such a doctrine has application.

Although Petitioners do not believe that there is any Congressional mandate for the doctrine of "fraudulent concealment," the Court should establish standards if it ultimately determines the doctrine to be applicable under Section 10(b) of the Act. This case is particularly significant since findings exist which establish Union knowledge of the operative facts more than six months prior to the filing of the charge. Petitioners submit that if the doctrine of "fraudulent concealment" exists, appropriate standards would make the doctrine inapplicable in the instant case.

C. The Board's Application Of The "Single Employer" Doctrine In This Case Serves To Disenfranchise Burgess Construction's New Carpentry Crew, In Violation Of Section 9(b) Of The Act.

Section 9(b) of the Act requires the Board to determine the unit appropriate for bargaining which will "assure the employees the fullest freedom in exercising the rights guaranteed by [the] Act." Pursuant to the mandate of Section 9(b), the Board and the courts have consistently held that an existing collective bargaining agreement may *not* be extended to a new group of employees who may constitute a separate appropriate unit of themselves. *Pullman Industries, Inc.*, 159 NLRB 580 (1966), *National Labor Relations Board v. Masters-Lake Success, Inc.*, 287 F.2d 35 (2d Cir. 1961); *Spartans Industries, Inc. v. National Labor Relations Board*, 406 F.2d 1002 (5th Cir. 1969); *Local 919, Retail Clerks International Association v. National Labor*

Relations Board, 416 F.2d 1118 (D.C.Cir. 1969); *Sheraton-Kauai Corporation v. National Labor Relations Board*, 429 F.2d 1352 (9th Cir. 1970).

In *South Prairie Construction Company v. Local No. 627, International Union Of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976), this Court held that the fact that two affiliated firms (Kiewit and South Prairie) constituted a "single employer" did not necessarily establish that an employer-wide unit was appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are *not* conclusively determinative of the scope of an appropriate unit.

Implicit in that decision is the recognition that the contract would not be extended to South Prairie's employees if they were found to be an appropriate unit of themselves. On remand, the Board held that:

> "... [T]he immediate issue before us is whether South Prairie's Oklahoma employees constitute an appropriate bargaining unit separate from Kiewit's employees." *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, at 76 (1977).

The Board went on to find that the South Prairie employees did constitute a separate unit, and held that the existing contract covering the Kiewit employees could not be extended to cover the South Prairie employees. 231 NLRB at 78.

In the instant case, in contrast to the *Peter Kiewit* case, the Board has not considered this critical issue. Instead, the Board has merely considered whether the Burgess Con-

struction employees and the V&B employees constituted an overall appropriate unit (C. 2).

Upon review, the Court of Appeals disregarded the *Peter Kiewit* decision and the many decisions on this point among the circuits, including its own (A. 16-17). *National Labor Relations Board v. Masters-Lake Success, Inc., supra; Spartans Industries, Inc. v. National Labor Relations Board, supra; Local 919, Retail Clerks International Association v. National Labor Relations Board, supra; Sheraton-Kauai Corporation v. National Labor Relations Board, supra.*

As a consequence, the decision of the Court of Appeals has created a clear conflict among the circuits and a misapplication of the *Peter Kiewit* decision.

D. The Board's Denial Of Petitioners' Motion To Reopen The Record Was Arbitrary And Capricious And A Denial Of Due Process.

After the hearing before the Administrative Law Judge had been closed, Petitioners filed a Motion to Reopen the Record to present, *inter alia,* the testimony of three additional witnesses (R. 92-97). In support of its Motion, Petitioners submitted affidavits of the three witnesses, two of whom were Union members, which clearly established that the Union had knowledge of the alleged unfair labor practices at least *nine months* prior to filing its charge (R. 98-109). Had this evidence been addressed and credited, the case would have had an entirely different outcome, for there would have been no basis for the Board's extraordinary finding of "fraudulent concealment." As required by the Board's Rules and Regulations, Series 8, as amended

(29 C.F.R. § 102.84(d)(1)), Petitioners' Motion explained that "the evidence contained in the affidavits was not presented previously because it [was] *newly-discovered evidence.*" In support of this explanation, two of the witnesses explained in their affidavits that they (the affiants) had only then come forward to give the information to Petitioners *because they (the affiants) had only recently become aware of the Board's action.* Significantly, the Motion was filed within six days after two of the affidavits were executed and within 35 days after the third was executed. The Motion itself further set forth, *in detail,* the materiality of the expected testimony, as well as why, if adduced and credited, the new evidence would require a different result (R. 93, 99, 104). At no stage of the proceedings below was there any finding or implication that the new witnesses were available to Petitioners at trial.

Despite the critical nature of the new witnesses' testimony, the Board summarily denied the Motion as "failing to state sufficient basis for granting such a motion" (C. 1). Upon review, the Court of Appeals acknowledged the *"obvious importance"* of the Motion to the Section 10(b) issue, but held the Board's denial of the Motion was not an abuse of discretion. The Court of Appeals did not state in what way, if any, the Petitioners had failed to meet their burden of prevailing on the Motion (A. 22).

Because the newly-discovered evidence would necessarily have altered the outcome of this case, the Board's denial of Petitioners' Motion was arbitrary and capricious and constitutes an unconscionable denial of due process.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 27, 1979

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 77-3437

National Labor Relations Board,
Petitioner,

and

Sequoia District Council of Carpenters,
Intervenors,

vs.

Don Burgess Construction Corporation, d/b/a Burgess Construction,

and

Donald Burgess and Verlon Hendrix, d/b/a V & B Builders,
Respondents.

[May 4, 1979]

Application for Enforcement of an Order of
The National Labor Relations Board

OPINION

Before: CHOY and SNEED, Circuit Judge, and BONSAL,* District Judge.

SNEED, Circuit Judge:

This case is before us on the application of the National Labor Relations Board for enforcement of its order en-

*Hon. Dudley B. Bonsal, Senior United States District Judge, for the Southern District of New York, sitting by designation.

tered against Don Burgess Construction Corporation d/b/a Burgess Construction (BC) and Donald Burgess and Verlon Hendrix d/b/a V & B Builders (VB). The Board's decision and order is reported at 227 N.L.R.B. 765 (1977). On November 14, 1977, this Court granted the motion of the Sequoia District Council of Carpenters (Union) to intervene. This Court has jurisdiction of this proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151 et seq.), as the unfair labor practices found by the Board occurred at Fresno, California.

We find substantial evidence in the record as a whole to support the Board's findings and conclude that its order should be enforced.

I.

FACTS.

BC is a California corporation with its principal place of business in Fresno, California, engaged in business as a general contractor for light commercial construction. BC was formed in August 1973 with Donald Burgess as president, general manager and principal stockholder holding a 70 percent interest in the company.

In May 1974, BC decided to employ its own carpentry crew of several union carpenters including Verlon Hendrix as foreman. On June 6, 1974, Burgess signed a memorandum agreement with the Sequoia District Council of Carpenters binding BC to the terms of the 1971-1974 master area agreement. By its own terms this agreement expired on June 15, 1974.

In August 1974, Burgess and Hendrix made an oral agreement forming VB, a 50/50 partnership, which was to operate as a general contractor and carpentry subcontractor. Each partner contributed $250. The agreement was reduced to writing and signed nine months later. Upon formation of the partnership all the carpenters employed by BC were transferred to VB.

On August 6, 1974, Union business agent John Horn approached Burgess at the jobsite and requested Burgess to sign the Union's 1974-1977 master agreement. Burgess replied that BC was not interested in signing the agreement as it no longer employed carpenters. Burgess indicated that the carpenters working on the project were now employed by VB. When Horn asked whether VB would sign the agreement, Burgess said that he would discuss the matter with Hendrix. That same day Burgess signed a memorandum agreement binding VB to the terms of the 1974-1977 master agreement, with which VB has remained in full compliance.

In October 1974, Burgess wrote the Union stating that BC "is not a signatory to your agreement. If you feel you have recognition, please contact me." The Union's executive secretary, Lawrence Null, immediately called Burgess to determine whether Burgess denied signing the current Union contract. Burgess replied that all his carpenters were on VB's payroll and that BC would not be employing carpenters. Null was satisfied that the VB carpenters were protected under the signed agreement, their wages were correct, and contributions were being made on their behalf to the Trust Fund.

BC employed no carpentry employees of its own from August 1, 1974 until January 1975 at which time it began employing nonunion carpenters. BC did not apply the terms of the VB union contract to these new employees. In late March 1975, during a routine check of construction projects, Business Agent Horn discovered nonunion carpenters working at one of BC's projects. In a followup investigation a few days later, the project was back in compliance using only union workers. The union took no action.

On May 1, 1975, through another routine check, the Union again found nonunion carpenters working at the same BC jobsite. The Union picketed the jobsite from May 6 to May 9 to protest the use of the nonunion carpenters.

II.

BOARD PROCEEDINGS.

On October 15, 1975, the Union filed an unfair labor practice charge against BC that alleged violations of section 8(a)(1), (3) and (5) of the Act. In its Decision and Order, the Board found, in agreement with the Administrative Law Judge, that the complaint was timely filed, that BC and VB were a single employer, that the carpenters employed by them constituted a single appropriate unit, and that the respondents, BC and VB, had violated section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the bargaining representative for BC's carpentry employees, by failing to apply the terms and conditions of the Union contract to those employees, and by unilaterally changing those employees' terms and conditions of employment. The Board also found that the respondents discriminated in violation of section 8(a)(3) and (1) of the Act by laying off union carpenters at VB while at the same time BC was hiring nonunion carpenters.

The Board's order requires BC and VB to cease and desist from the unfair labor practices so found, and in any other manner interfering with employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires BC and VB to reinstate and make whole the employees unlawfully laid off; to recognize and bargain with the Union upon request; to give retroactive effect to the terms and conditions of the 1974-1977 collective bargaining agreement; to apply the terms of the agreement to the carpenters employed by BC; to make the BC carpenters whole for any wage losses they may have suffered from January 1975; to pay to the Union's trust fund any contributions required by the agreement; and to post appropriate notices.

Respondents attack the Board's order on numerous grounds. They invoke the protection of section 10(b) of the Act initially. Next they insist that the single employer finding has no basis in law or fact, that the carpenters employed by BC and VB do not constitute a single appropriate bargaining unit, that there existed no intent on the part of VB and the Union to extend the collective bargaining agreement to the employees of BC, that in any event there were no unfair labor practices, and that the Board's order violates federal antitrust law. Finally, respondents insist that the Board abused its discretion in denying their motion to reopen the record. None of these attacks strike home. We shall discuss each in the order of their recital above.

III.

THE SECTION 10(b) ISSUE.

Section 10(b) of the Act on which the respondents rely provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." 29 U.S.C. § 160(b) (1976). Respondents point out that under *Local 1424, International Association of Machinists v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960) there must exist substantial evidence of unfair labor practices after April 15, 1975,[1] the date which is six months "prior to the filing of the charge with the Board," *viz.* October 15, 1975. They correctly assert that the unfair labor practice charge based on BC's hiring of a separate nonunion carpentry crew beginning in late January 1975 involved events well before April 15, 1975. The Board, of course, does not disagree. Rather it invokes an exception to the statute of limitations of section 10(b). It concluded that knowledge of these events was acquired by the Union no earlier than May 1975, a time well within the prescribed six months. It

[1] *Local 1424, International Association of Machinists v. NLRB (Bryan Manufacturing Co.), supra*, distinguished between two kinds of situations. The first is when the occurrences within the relevant six months period constitute in and of themselves unfair labor practices. A complaint based on these occurrences would be timely filed. *Id.* at 416. As section 10(b) is characterized as a statute of limitations and not a rule of evidence, *Id.* at 416 n.6, evidence of events occurring outside the six-months period may be used to "shed light" on events within the six-months period, but the evidence of a violation within the relevant time period must be substantial in its own right. *NLRB v. Macmillan Ring-Free Oil Co.*, 394 F.2d 26, 33 (9th Cir.), *cert. denied*, 393 U.S. 914 (1968).

In the second situation occurrences within the relevant six-months period can be deemed unfair labor practices only "through reliance on an earlier unfair labor practice." 362 U.S. at 417. Cases within this category are barred by section 10(b).

also found that BC fraudulently concealed the unfair labor practice and thereby prevented the discovery and timely filing of the charge by the Union.

The general rule applicable to federal statutes of limitations is that "a limitation period begins to run 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation].'" *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977) (quoting *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962)); *accord, International Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972). It is clear that fraudulent concealment tolls a statute of limitations. The Supreme Court stated:

> Where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)). "This equitable doctrine is read into every federal statute of limitations," 327 U.S. at 397, including section 10(b). *International Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972).[2]

[2] Another circuit has set forth the following required elements for tolling a statute of limitations: (1) fraudulent concealment by the party raising the statute together with (2) the other party's failure to discover the facts which the basis of his cause of action despite (3) the exercise of due diligence on his part. *Charlotte Telecasters*

Here the Board found that BC "fraudulently concealed" its unlawful employment of nonunion carpenters from the Union by assuring the Union on two occasions that it would no longer employ carpenters. The first was Burgess' conversation with Business Agent Horn on August 6, 1974 in which Burgess refused to sign the Union contract on behalf of BC because it was no longer employing carpenters. The Administrative Law Judge found that this statement "carried with it the reasonable implication that thenceforth V & B, and not Burgess Construction, would employ carpenters." 227 N.L.R.B. at 771. The second occasion was Burgess' conversation with Executive Secretary Null in October 1974. Although Burgess testified to the contrary, the Administrative Law Judge credited Null's testimony that Burgess assured him that BC would not be employing carpenters in the future. We recognize that such credibility resolutions will be sustained "unless inherently incredible or patently unreasonable." *NLRB v. Anthony Co.*, 557 F.2d 692, 695 (9th Cir. 1977); *accord, NLRB v. Dodson's Market, Inc.*, 553 F.2d 617, 619 (9th Cir. 1977). We, therefore, uphold the Administrative Law Judge's findings of credibility.

It is true as the respondents assert that fraudulent concealment tolls a statute of limitations only for as long as the concealment endures. *Emmett v. Eastern Dispensary and Casualty Hospital*, 397 F.2d 931, 938 (D.C. Cir. 1967). If the Union actually knew, or by the exercise of due diligence should have known about the alleged unfair labor practice, the statute would not be tolled. *Id.* at 936; *Westinghouse Electric Corp. v. City of Burlington*, 315 F.2d 762, 764 (D.C. Cir. 1965). It is not true, as respondents contend, that the Board's finding that the Union failed to discover BC's hiring of nonunion carpenters until 1975 is unsupported by the record. Substantial evidence on the record so supports this finding.[8]

v. *Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). The party seeking the benefit of the avoidance of the statute of limitations carries the burden of proof to establish the elements. *Id.* at 574 n.3. Moreover, all presumptions are against him since his claim to exemption is against the current of the law and is founded on exceptions. *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974).

Direct evidence on this matter is contained in Secretary Null's testimony:

> GENERAL COUNSEL: Subsequent to that conversation in October [1974], Mr. Null, did you receive any information concerning whether or not Mr. Burgess was employing nonunion, that is Burgess Construction was employing carpenters itself?
> NULL: Prior to this [October 14] letter?
> GENERAL COUNSEL: No, after, anytime after?
> NULL: The following year, early in the first of April, around the first of April.
> GENERAL COUNSEL: Can you tell us how you acquired this information first of all?
> NULL: Routine job check of the business agent John Horn brought in the report that he had found a couple of non-Union carpenters on the project at Gong's out at First and Bullard.

Reporter's Transcript at 391-92. From this testimony the Board inferred that April 1, 1975 was the first time Null

[8] Section 10(e) of the Act directs that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e) (1976). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

suspected that BC was hiring nonunion carpenters, a suspicion he was able to confirm in May 1975. The record also reveals that the hiring of nonunion carpenters during this pre-10(b) period involved only a few workers. Specifically, in January, BC hired only one nonunion carpenter; in February, two; in March, three; in April, four. Under these circumstances it is not unreasonable to assume that only a routine check would alert the Union to this practice. The Board is free to make reasonable inferences based on direct and circumstantial evidence. *See NLRB v. Anthony Co.*, 557 F.2d 692, 696 (9th Cir. 1977). Therefore, substantial evidence exists to support the conclusion that the Union neither knew nor should have known of BC's practice prior to May 15. In contrast, no evidence in the record indicates the Union had effective knowledge concerning BC's hiring of nonunion carpenters before May 1975.

It follows that the Board's holding that BC's fraudulent concealment tolled section 10(b) and that the October 15 charge is timely filed must be accepted.

IV.

SINGLE EMPLOYER FINDING.

Having their strongest defense overrun by force of the record made in this case compels the respondents to take up even weaker positions. They insist, for example, they do not constitute a single employer. The Board held otherwise. On this record we must sustain the Board.

It is settled that the Board may treat two or more distinct business entities as a "single employer" for purposes

of the Act.[4] In such cases, the criteria to which the Board looks in order to determine single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Radio Union v. Broadcast Service, Inc.*, 380 U.S. 255, 256 (1965), *quoted with approval in South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 802 n.3 (1976); *Sakrete, Inc. v. NLRB*, 332 F.2d 902, 905 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). The Board has stressed the first three of these factors, as well as the presence of control of labor relations. *Id.* at 905 n.4 (quoting with approval from *NLRB Twenty-First Annual Report* at 14-15). However, no one of the factors is controlling, *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Local 627, International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue sub nom. South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976).

The Board's determination that BC and VB constitute a single employer for purposes of the Act is primarily

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[4] Section 2 of the Act provides, in relevant part:

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, [or] corporation . . . .
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

29 U.S.C. § 152(1), (2) (1976).

factual, and should be sustained "if it has 'warrant in the record' and a reasonable basis in law." *NLRB v. Hearst Publication,* 322 U.S. 111, 131 (1944), *cited* in this context in *Local 627, International Union of Operating Engineers v. NLRB, supra,* 518 F.2d at 1047. *See also Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). Our examination of the record indicates that the Board's determination meets this test. To demonstrate this we shall analyze the record from the standpoint of each of the relevant criteria.

A Interrelation of Operations.

The record reflects unmistakably an interrelation of operations. At the time of VB's formation, BC's carpenters were simply transferred to the VB payroll, in the middle of the job, without interruption or change in their work. Hendrix continued to supervise the employees and continued to be paid union scale and to have pension contributions made on his behalf. VB used the same tools, previously purchased by BC, that the carpenters had been using before VB was created. In fact, VB did not purchase tools of its own until October 1975.

For the first year and a half of VB's operations all of its work came from BC which awarded almost all of its outside carpentry work to VB. The only exceptions were work VB did not request or which required specialized skills not possessed by either BC or VB employees. In most cases VB obtained its subcontracts from BC by direct negotiations rather than by bidding competitively against other subcontractors. VB did not bid on work for other contractors until the end of August 1975, and did not obtain any work from other contractors until January 1976. From

August 6, 1974 to March 31, 1976, the value of services VB performed was as follows: For BC, $145,115; for California State University, $5,652; for Pacific Steel Erectors, $240. VB carpenters and BC carpenters often worked at the same project sites during the same general time periods. Hendrix worked alone on two BC jobsites and was paid by VB for that work.

Although BC and VB maintained separate payrolls and bank accounts and submitted separate tax returns and other reports to the State and Federal governments, they used the same accountant, Bob Minyard, who was a full-time BC employee. Until mid-1975 Minyard and Burgess prepared all of VB's financial reports to the Union's Trust Fund. The reports to the fund listed Burgess's home address as the office of VB before 1975 and BC's office address as that of VB from February to December 1975.

B. Common Management.

The record also reflects substantial evidence of common management. BC and VB are managed separately at the worker level. BC has its management staff which includes its president Donald Burgess, two project managers, and foreman Gerald Happeny. VB, on the other hand, is managed by Hendrix. There is record evidence, however, that Burgess directed a VB's employee's work on at least one occasion and that in 1974 VB employees, Kuykendall and Sharp, reported to BC's office for work assignments.

Burgess' control of VB at the policy level, as a consequence of the functional interrelation of the two companies, is quite significant. *See Sakrete, Inc. v. NLRB,* 332

F.2d 902, 907 (9th Cir. 1964). VB used Don Burgess' personal contractor's license until November 1975. Because contractor licenses are by California law nontransferable, Cal. Bus. & Prof. Code § 7075 (West 1975), the license remained that of Burgess. Moreover, even when VB was granted its license, Burgess was the "qualifying" individual who, under California law, "shall be responsible for exercising such direct supervision and control . . . as is necessary to secure full compliance with [the law] . . . ." *Id.* § 7068.1.

C. Centralized Control of Labor Relations.

There also exists substantial record evidence that Burgess made the policy decision regarding labor relations for both respondents. It was Burgess who decided to form a nonunion BC carpentry crew and asked VB carpenters Kuykendall and Sharp whether they wanted to participate on that basis. Burgess initially signed the 1971-1974 union contract on behalf of BC and later the 1974-1977 union contract on behalf of VB. Indeed, the record shows that the Union's dealings with both VB and BC were always with Burgess. Burgess, rather than Hendrix, prepared and submitted the VB monthly reports to the Union's Trust Fund until December 1974. Hendrix testified that he was unaware of the source of the first month's payment to the fund.

D. Common Ownership.

The record also reflects common ownership. Don Burgess owned 70% of BC and was a 50% partner in VB.

E. Conclusion.

To repeat, these facts, considered as a whole, amply demonstrate that the Board's finding that VB and BC constituted a single employer "has 'warrant in the record' and a reasonable basis in law." *NRLB v. Hearst Publication, supra,* 322 U.S. at 131.

V.

APPROPRIATE BARGAINING UNIT.

We now turn to the Board's determination that the employees of BC and VB constituted a single bargaining unit. The fact that two companies have been designated a single employer for purposes of the Act is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the employees of each constitute a single bargaining unit. *See South Prairie Construction Co. v. Local 627, International Union of Operating Engineers,* 425 U.S. 800, 805 (1976). Section 9(b) of the Act, 29 U.S.C. 159(b) (1976), confers upon the Board a broad discretion to determine appropriate units "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act]." Our power of review is quite limited. We are not to overturn the Board's decision unless it is "arbitrary and capricious." *See Packard Motor Co. v. NLRB,* 330 U.S. 485, 491 (1947); *Victoria Station v. NLRB,* 586 F.2d 672, 675 (9th Cir. 1978); *NLRB v. Allied Products Corp.,* 548 F.2d 644, 648 (6th Cir. 1977).

In determining the appropriateness of a bargaining unit the focus differs from that employed in deciding whether there is a single employer. "In determining whether a single employer exists we are concerned with the common owner-

ship, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved." *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76, 77 (1977). A community of interest among employees is evidenced by a similarity in their skills, duties, and working conditions. *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir. 1978).

The Board, in finding that the carpentry employees of BC and VB constituted an appropriate unit, relied on "the fact that all of the employees possess the same skills, perform the same functions, share the same general working conditions, and usually work at the same situs." 227 N.L.R.B at 765. The record supports this finding. The respondents, nevertheless, contend that the Board's finding is erroneous as a matter of law because the Board neither considered, nor found, that the new BC carpentry crew constituted an "accretion" to the existing VB employee unit.[5] It is true that the Board is called upon to make a determination of appropriate bargaining unit in several different procedural settings, one of which arises when a new group of employees is involved.[6] This case, however, does

[5] "Accretion" is merely the addition of new employees to an existing group. *NLRB v. Food Employers Council, Inc.*, 399 F.2d 501, 503 (9th Cir. 1968). The most obvious example of an accretion is addition of employees through normal turnover. Any union contract already binding on the group would automatically be extended to these employees.

[6] R. Gorman, Basic Text on Labor Law 70 (1976) gives the following four procedural settings:

> (a) *initial organization*, when there is no history of collective bargaining; (b) *severance*, when there is an existing unit . . . and a group of employees wish to split off from the larger group and to bargain separately; (c) *accretion*, the opposite of severance, when there is an existing unit and through merger or other acquisition a group of employees (whether organized or not) is absorbed into the existing business enterprise; and (d) *unit clarification*, when the creation of a new job or the change in description of an existing job (and accretion as well) creates uncertainty as to the inclusion of those jobs in or their exclusion from an existing unit.

not present a setting in which the doctrine of accretion is properly applicable.[7] Accretion concerns whether certain employees should be absorbed into an existing unit. The issue here is what constitutes the proper existing unit. VB did not acquire BC nor did it employ BC to conduct its operations at a different location. Here a single employer, consisting of VB *and* BC, merely shifted work from the employees of VB to those of BC. If the employees of both constitute an appropriate bargaining unit because of their community of interests, there is no need for the Board to concern itself with accretion. Its failure to find "accretion" was not erroneous as a matter of law.

Nor do the respondents fare better when they argue that the Board must determine whether BC and VB employees

[7] Analysis of whether a new group of employees is an accretion to an existing unit rather than a separate bargaining unit is important in such situations as the following:

(1) Mergers. *See, e.g., Temple-Eastex, Inc.*, 228 N.L.R.B. 203 (1977).

(2) A multiple location employer adding a new unit. *See, e.g., Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352 (9th Cir. 1970); *NLRB v. Sunset House*, 415 F.2d 545 (9th Cir. 1969); *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76 (1977); *Meijer, Inc.*, 222 N.L.R.B. 18 (1976).

(3) A union contract which is newly interpreted to cover a distinct, separately identifiable group of employees. *See, e.g., NLRB v. Food Employers Council, Inc.*, 399 F.2d 501 (9th Cir. 1968) (Retail Clerks Union claims to represent snack bar employees).

In these circumstances it must be determined whether these employees will be unreasonably disenfranchised regarding union membership if they are "accreted" to the existing union. *See NLRB v. Sunset House*, 415 F.2d 545, 547 (9th Cir. 1969).

constitute the *only* appropriate unit. They insist that if BC employees could be an appropriate unit by themselves, any finding that accreted these employees to VB would be erroneous. The argument assumes that accretion is a relevant doctrine, an assumption already branded false. Furthermore, the law does not require representation in the most appropriate unit. *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 532 (9th Cir. 1968); *Temple-Eastex, Inc.*, 228 N.L.R.B. 203, 209 (1977). The Board did not abuse its discretion in designating BC carpentry employees and VB carpentry employees as an appropriate bargaining unit.

VI.

INTENT OF THE PARTIES.

The respondents final effort to avoid the application to the employees of BC of the collective bargaining agreement consists of its insistence that the evidence establishes no intent of the parties to provide such coverage to BC's employees. They rely primarily on *B & B Industries, Inc.*, 162 N.L.R.B. 832 (1967) and *A-1 Fire Protection, Inc.*, 233 N.L.R.B. No. 9 (1977), 96 L.R.R.M. 1440.[8] Each can be distinguished from the instant case. In *B & B* the unions knew that they were dealing with two business entities, both employing persons performing similar work. The union's failure to obtain the signature of both companies to the contract indicated that it acquiesced in a contract cov-

[8]In both cases the Board refused to extend a union contract of a fully integrated single employer to the nonunion unit because there was no evidence that there was ever any agreement to cover this unit. The respondents argue that BC expressly rejected the union contract on August 6, 1974 and made it clear in the October 14, 1974 letter that BC did not intend to be bound by the union contract with VB. Furthermore, the Union only intended to cover the VB employees, which it has done.

ering only one company. A similar knowing acquiescence in a nonunion operation was found by the Board in *A-1*. Here the Board found that the Union relied on Burgess' assertions that BC did not intend to hire carpenters. The evidence thus indicates that the August 6, 1974 contract between VB and the Union was intended to cover *all* carpenters working for the operations of Donald Burgess. The Union never intended the contract to cover only a portion of such carpenters. Respondents intention argument fares no better than its predecessors.

VII.

THE UNFAIR LABOR PRACTICES.

A. Violation of Section 8(a)(5) and (1).

Our deference to the Board's findings that BC and VB constitute a single employer and that their employees are an appropriate bargaining unit requires that we sustain the Board's determination that the respondents violated section 8(a)(5) and (1) of the Act by refusing to apply the terms of the union contract to the BC carpenters, thereby unilaterally changing the terms and conditions of their employment.[9] In addition, we must recognize that respond-

[9]Where the employees of business entities forming a single employer also constitute a single appropriate unit, a collective bargaining agreement signed by part of a single employer is binding on the single employer as a whole, and the employer is obligated to give effect to the agreement as to all employees within the single appropriate unit. Either failure to apply material terms of the agreement or unilateral changes in those terms as to part of the unit employees violates section 8(a)(5) and (1) of the Act. *Local 627, International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1046-47 (D.C. Cir. 1975); *NLRB v. Royal Oak Tool & Machine Co.*, 320 F.2d 77, 80-83 (6th Cir. 1963); *J. Howard Jenks d/b/a Glendora Plumbing*, 165 N.L.R.B. 101, 102 (1967). *See also South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 801, 803 (1976); *NLRB v. Katz*, 368 U.S. 736, 742-43 (1962).

ents had "a continuing duty to recognize the Union as the representative" of the BC employees, even without a specific request by the Union. *See NLRB v. Triumph Curing Center*, 571 F.2d 462, 474 (9th Cir. 1978). Failure to do so constitutes a violation of section 8(a)(5). The evidence is sufficient to support these findings.

B. Violation of Section 8(a)(3) and (1).

Respondents also violated section 8(a)(3) and (1) of the Act by discriminating between their union and nonunion employees in the single unit in allocating bargaining unit work and in selecting employees for layoff.[10] *J. Howard Jenks d/b/a Glendora Plumbing*, 165 N.L.R.B. 101, 102 (1967).

The Board found that the respondents discriminated by shifting bargaining unit work from VB's union carpenters to BC's nonunion crew during the January-September period. This finding was based on the facts that during this period (1) the number of VB carpenters was reduced from five to two while the number of BC carpenters was increased from one to eight, and (2) the number of hours VB carpenters worked was reduced from 652 hours to 347 hours per month while the hours worked by BC carpenters was increased from 135 hours to 1165.5 hours per month. In addition, all of this work was on BC projects, the majority of which used both VB and BC carpenters performing similar work at the same jobsites.

[10]Section 8(a) of the Act provides, in relevant part, that it is an unfair labor practice for an employer . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 160(e) (1976).

The Board found that this deliberate shifting caused the discriminatory layoff of VB union employees Pinnel, Ellis and Gomez in violation of section 8(a)(3) and (1) of the Act. VB's payroll records show that employees were typically retained from one project to the next. At the time of the layoff of these union carpenters, four nonunion carpenters were working for BC. The Board could reasonably conclude that the discrimination between employees was based solely on the fact that the VB carpenters were covered by the contract while it was thought the BC carpenters were not. Accordingly, the layoffs violated section 8(a)(3) and (1) of the Act.

VIII.

VIOLATION OF FEDERAL ANTITRUST LAWS.

Respondents' contention that the Board's order violates the antitrust laws need not be considered. Its assertion is untimely. Not having asserted the violation before the Administrative Law Judge or the Board, we are precluded by section 10(e) from considering it here.[11] *NLRB v. Ochoe Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *NLRB v. Apico Inns, Inc.*, 512 F.2d 1171, 1174 (9th Cir. 1975).

IX.

DENIAL OF MOTION TO REOPEN THE RECORD.

Respondents earnestly contend that the Board abused its discretion in denying respondents' motion to reopen the record to receive three affidavits purporting to show:

[11]Section 10(e) provides, in relevant part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court . . . ." 29 U.S.C. § 160(e) (1976).

(1) Union Executive Secretary Null had testified falsely when he stated that the first time he knew of BC's nonunion carpenters was in May 1975, and (2) that the Union contract with VB was not intended to be binding on BC. The Board denied the motion as "failing to state a sufficient basis for granting such a motion." 227 N.L.R.B. at 765 n.2. We have examined the record as it pertains to this motion particularly carefully because of its obvious importance to the section 10(b) issue discussed in Part III of this opinion. Nonetheless, we leave the Board's denial intact.

The grant or denial of a motion to reopen the record rests in the Board's discretion. *NLRB v. Victor Otlans Roofing Co.*, 445 F.2d 299 (9th Cir. 1971). The Board's Rules and Regulations, Series 8, as amended (29 C.F.R.), section 102.48(d)(1) provide that:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which had become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Accordingly, it was respondents' burden to show the materiality of the proffered evidence and why it was not introduced at the hearing. *NLRB v. West Coast Casket Co.*, 469 F.2d 871, 873 (9th Cir. 1972). We agree that the respondents failed to meet their burden. Thus, denial of respondents' motion to reopen the record was not an abuse of discretion.

ORDER ENFORCED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3437

National Labor Relations Board,
Petitioner,

and

Sequoia District Council of Carpenters,
Intervenor,

vs.

Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders,
Respondents.

[Filed June 8, 1979]

JUDGMENT

Before: CHOY and SNEED, Circuit Judges, and BONSAL,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of an order issued by it against Respondents, Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders,

*Hon. Dudley B. Bonsal, Senior United States District Judge, for the Southern District of New York, sitting by designation.

Fresno, California, their officers, agents, successors, and assigns, on January 7, 1977. The Court heard argument of respective counsel on February 7, 1979, and has considered the briefs and transcript of record filed in this cause. On May 4, 1979, the Court, being fully advised in the premises, issued its opinion granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondents, Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders, Fresno, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Sequoia District Council of Carpenters, AFL-CIO (hereinafter called the Union), or any other labor organization, by laying off employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment because of their union or protected concerted activities.

(b) Violating the terms of the 1974-77 collective-bargaining agreement signed by Donald Burgess on behalf of V & B Builders, and also binding on Burgess Construction as a segment of the single integrated enterprise comprising both Respondents.

(c) Refusing to bargain with the Union with respect to wages, hours, or working conditions or other terms of employment of carpenters employed by both Respondents.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer Richard Pinnel, Brian Ellis, and Jose Gomez immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the Board's Decision and Order.

(b) Upon request, give recognition to and bargain with the Union with respect to the wages, hours, and conditions of employment of Respondents' carpenters who are represented by the Union, and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

(c) At the Union's request, give retroactive effect to the aforesaid 1974-77 collective-bargaining agreement and

apply the agreement to the carpenters in the employment of Burgess Construction, and make such carpenters whole for any wage losses they may have suffered from January 1975, with interest at 6 percent per annum, and pay to the Carpenters trust fund referred to in the collective-bargaining agreement the prescribed health and welfare, retirement, and other contributions on behalf of such carpenter employees which became due from January 1975.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Post at their Fresno, California, facilities, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (San Francisco, California), shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondents have taken to comply herewith.

Costs in this court in favor of the petitioner and against the respondent:

28 copies of petitioner's opening brief	$213.56
28 copies of petitioner's reply	89.92
Records Reproductions	59.00
	$362.48

Endorsed, Judgment Filed and Entered

SO ORDERED:
JUDGES:

/s/ Emil E. Melfi
Emil E. Melfi
Clerk

/s/ Herbert Y.C. Choy
Herbert Y.C. Choy, CJ

[A TRUE COPY

/s/ Joseph T. Sneed
Joseph T. Sneed, CJ

ATTEST:
Emil E. Melfi
Clerk]

/s/ Dudley B. Bonsal
Dudley B. Bonsal, DJ

A TRUE COPY

ATTEST

18 Jun 1979

EMIL E. MELFI, JR.
Clerk of Court

by: /s/ J. Ronken
Deputy Clerk

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT discourage membership in Sequoia District Council of Carpenters, AFL-CIO, or any other labor organization, by laying off employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment because of their union or concerted activities.

WE WILL NOT violate the terms of the 1974-77 collective-bargaining agreement signed by Donald Burgess on behalf of V & B Builders and also binding on Burgess Construction as a segment of the single integrated enterprise comprising both companies.

WE WILL NOT refuse to bargain with the Union with respect to wages, hours, or working conditions or other terms of employment of carpenters employed by us.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities

except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL offer Richard Pinnel, Brian Ellis, and Jose Gomez immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings suffered by reason of the discrimination against them.

WE WILL, upon request, give recognition to and bargain with the Union with respect to the wages, hours, and conditions of employment of Respondents' carpenters who are represented by the Union and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

WE WILL at the Union's request, give retroactive effect to the aforesaid 1974-77 collective-bargaining agreement and apply the agreement to the carpenters in the employment of Burgess Construction and make such carpenters whole for any wage losses they may have suffered from January 1975, with interest at 6 percent per annum, and pay to the Carpenters trust fund referred to in the collective-bargaining agreement the prescribed health and welfare, retirement, and other contributions on behalf of such carpenter employees which became due from January 1975.

All our employees are free to become, remain, or refrain from becoming or remaining, members of Sequoia District

Council of Carpenters, AFL-CIO, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

DON BURGESS CONSTRUCTION CORPORATION
d/b/a BURGESS CONSTRUCTION
AND
DONALD BURGESS AND
VERLON HENDRIX
d/b/a V & B BUILDERS

(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 450 Golden Gate Avenue, 13018 Federal Building, Box 36047, San Francisco, California 94102, Telephone 415-556-0335.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3437

National Labor Relations Board,
Petitioner,
and
Sequoia District Council of Carpenters,
Intervenor,
vs.
Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders,
Respondents.

[Docketed May 17, 1979]

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned case has this day

been served by first class mail upon the following counsel at the addresses listed below:

Van Bourg, Allen, Weinberg,
Williams & Roger
Att: David Rosenfeld, Esq.
45 Polk Street
San Francisco, California 94102

Littler, Mendelson
& Fastiff
Att: George J. Tichy, II,
and James J. Meyers,
Esqs.
650 California St.,
20th Floor
San Francisco, California
94108

Chinello, Chinello, Maddy,
Williams & Shelton
Att: John M. Shelton, Esq.
650 Lloyds Bank Building
1221 Van Ness Avenue
Fresno, California 93777

/s/ Elliott Moore
Elliott Moore
Deputy Associate General
Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 14th day of May, 1979.

Appendix C

[D-1959 Fresno, Calif.]

227 NLRB No. 119

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

DON BURGESS CONSTRUCTION
CORPORATION d/b/a BURGESS
CONSTRUCTION AND DONALD
BURGESS AND VERLON HENDRIX
d/b/a V & B BUILDERS

and

Case 20-CA-10713

SEQUOIA DISTRICT COUNCIL
OF CARPENTERS, AFL-CIO

DECISION AND ORDER

On July 29, 1976, Administrative Law Judge Herman Corenman issued the attached Decision in this proceeding. Thereafter, Respondent Don Burgess Construction Corporation (hereinafter Burgess Construction)[1] and General Counsel filed exceptions and supporting briefs.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1]At the hearing, counsel for Respondent V & B Builders stated that his client's position was parallel to and would be fairly represented by the presentation of Respondent Burgess Construction's position. He did not attend the remainder of the hearing.

[2]Respondent Burgess Construction has filed a motion to reopen the record. The General Counsel has filed a brief in opposition. Respondent's motion is hereby denied as failing to state a sufficient basis for granting such a motion.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. We agree with the Administrative Law Judge's findings that Burgess Construction and V & B Builders (hereinafter V & B) constitute a single employer inasmuch as, *inter alia,* Donald Burgess had control over the operations, financial affairs, and labor relations of both companies. We also agree with the findings that the Union did not acquiesce to Burgess Construction's employment of nonunion carpenters since it relied on Donald Burgess' misrepresentation that Burgess Construction would no longer hire carpenters.

The Administrative Law Judge concluded that since the two Respondents were a single employer the carpentry employees of both Respondents together constitute a single unit for collective-bargaining purposes. We agree that the carpentry employees of Burgess Construction and V & B constitute an appropriate unit. We rely both on the reasons set forth by the Administrative Law Judge and on the fact that all of the employees possess the same skills, perform the same functions, share the same general working conditions, and usually work at the same situs.

[3]The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

2. We find, contrary to the Administrative Law Judge, that Respondent V & B violated Section 8(a)(3) and (1) of the Act by laying off Richard Pinnel on May 1, 1975,[4] and Brian Ellis and Jose Gomez on May 27. The Administrative Law Judge correctly found that Respondents were shifting work from union employees at V & B to nonunion employees at Burgess Construction. They did so in order to avoid honoring the collective-bargaining agreement. The Administrative Law Judge, nevertheless, did not find the layoff of the three V & B carpenters to be unlawful because there were other possible reasons for their termination such as a layoff at the completion of a project.[5] V & B payroll records, however, show that employees were typically retained from one project to the next. For example, in February V & B worked on three projects, one ending in March, two in April. In March two more projects were added, both ending in September. In April another project was started which continued until June. The dates of employment for V & B employees show that it was usual for the same employees to be employed by V & B from project to project. Thus, V & B employees had the following employment pattern: Ronald Sharp worked from February 3 to December 30; Richard Pinnel worked from February 3 to March 23 and from April 7 to May 1; Jose Gomez

[4]All dates and named months hereafter are in 1975, unless otherwise indicated.

[5]The Administrative Law Judge relied on the fact that none of the three employees was called by General Counsel to explain the circumstances of his layoff, and that General Counsel gave no reason for failing to call them. The Board has held that if, as here, the record sustains allegations of unlawful discrimination against employees their testimony is not a *sine qua non* for relief under the Act. *Riley Stoker Corporation,* 223 NLRB No. 178, sl. op., pp. 3, 4 (1976), and cases cited therein.

worked from February 3 to March 23 and from April 7 to May 1; and Brian Ellis worked only the week of May 27.[6]

Since there is no evidence of voluntary termination and since four nonunion carpenters were working at Burgess Construction at the times of the V & B layoffs, the record supports the conclusion that the three carpenters V & B laid off would have continued to work, as Sharp did, had the Respondents not deliberately shifted work from union employees to nonunion employees.[7] Accordingly, we find that the layoffs of the V & B employees constitute discrimination in the terms and conditions of employment because of union membership in violation of Section 8(a)(3) and (1) of the Act.

3. The Administrative Law Judge found that although Respondent Burgess Construction first employed nonunion carpenters more than 6 months before the filing of the charge on October 15, 1975, the charge was not barred by Section 10(b) of the Act because the Union's unawareness of such conduct prevented the running of the period of limitations until it acquired knowledge in May 1975.[8] The

[6]By December 1975 only two carpenters were on V & B's payroll —Ronald Sharp and Verlon Hendrix, who is an equal partner in the Company. While Richard Pinnel and Jose Gomez had periods of unemployment after which they were recalled to work, and while Brian Ellis worked only 1 week, there is nothing to indicate that their employment pattern would have differed in any significant respect from that of Ronald Sharp and Verlon Hendrix had work been available.

[7]Cf. *Howard J. Jenks, d/b/a Glendora Plumbing*, 165 NLRB 101 (1967).

[8]The Administrative Law Judge also found that Burgess Construction was bound by the 1974-77 union contract signed by V & B and that Burgess Construction's continued violation of the contract terms during the 10(b) period amounted to a continuing refusal to bargain in violation of Sec. 8(a)(5) and (1) of the Act. We find it unnecessary to pass on this finding inasmuch as we con-

Administrative Law Judge, however, recommended a remedy limited to a period beginning April 15, 1975—a date exactly 6 months prior to the filing of the charge in the instant case. We agree with the Administrative Law Judge's findings that the charge was not barred by the 10(b) period. However, for the reasons set forth below, we find the remedy period began in January 1975, when Respondents commenced their unfair labor practices.

Section 10(b) of the Act establishes a period of limitations which bars the issuance of a complaint based on any unfair labor practices occurring more than 6 months prior to the filing of the charge. The period of limitations prescribed by Section 10(b) does not begin to run on an alleged unfair labor practice until the person adversely affected is put on notice of the act constituting it.[9] Here, Respondent Burgess Construction fraudulently and deceitfully concealed its unlawful employment of nonunion carpenters from the Union by assuring the Union on two occasions that it would no longer employ carpenters. Thus, although the Respondents' conduct began in January 1975, it was not until May 1975 that the Union, through a routine check, discovered that a nonunion crew was being employed by Burgess Construction.

It has long been recognized that when a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar

clude that the Union's unawareness of Respondents' unlawful conduct, due to Respondents' mispresentations to the Union, was sufficient to prevent the running of the 10(b) period until the Union acquired knowledge of the conduct.

[9]*Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Skippy Enterprises, Inc.)*, 211 NLRB 227 (1974), and cases cited therein.

of the statute does not begin to run until the fraud is discovered. . . .'"[10] In our view, this equitable doctrine is appropriate in the instant case where the Respondents' fraudulent concealment of its conduct prevented the timely filing of a charge by the Union.

Accordingly, we find, as did the Administrative Law Judge, that the 10(b) period of limitations is tolled from January 1975, when the Respondents commenced their unlawful conduct, until May 1975, when the Union acquired knowledge of it. Contrary to the Administrative Law Judge, who limited the remedy to the 6-month period preceding the filing of the charge, we find that since the limitations period had been tolled with respect to the cause of action it must also be tolled with respect to the remedy. To find otherwise would allow Respondents to escape from providing a full remedy as a result of the successful concealment of their unlawful conduct. This would contravene the equitable principles which allow the limitations period to be tolled in cases of fraudulent concealment.[11] We, therefore, shall expand the remedy period to include the period beginning January 1975.

4. Having found that Respondent V & B unlawfully laid off three union carpenters as a result of the deliberate

[10] *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1974). See also *Local Lodge No. 1424, International Association of Machinists, AFL-CIO [Bryan Mfg. Co.]*, 362 U.S. 411, 429 (1960), where the Supreme Court held that Sec. 10(b) of the Act barred the Board from dealing with conduct outside of the 10(b) period, but pointed out in fn. 19 that it was not dealing with a case of fraudulent concealment alleged to toll the statute.

[11] *International Ladies' Garment Workers Union, AFL–CIO v. N.L.R.B.*, 463 F.2d 907 (C.A.D.C., 1972), enfg. as modified *sub nom. McLoughlin Manufacturing Corporation*, 182 NLRB 958 (1970).

shifting of work from union employees to nonunion employees, we shall order that carpenters Richard Pinnel, Brian Ellis, and Jose Gomez be restored to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and that Respondents make each of them whole for any loss of pay, including loss of fringe benefits, they may have suffered by reason of the discrimination against them. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by us in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest computed thereon at 6 percent in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). To facilitate the computation, as well as to clarify the employees' right to reinstatement and employment, the Respondents shall make available to the Board, upon request, payroll and other records necessary and appropriate for such purposes.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders, Fresno, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Sequoia District Council of Carpenters, AFL-CIO, or any other labor organization, by laying off employees or in any other manner

discriminating against them in regard to their hire or tenure of employment or any term or condition of employment because of their union or protected concerted activities.

(b) Violating the terms of the 1974-77 collective-bargaining agreement signed by Donald Burgess on behalf of V & B Builders, and also binding on Burgess Construction as a segment of the single integrated enterprise comprising both Respondents.

(c) Refusing to bargain with the Union with respect to wages, hours, or working conditions or other terms of employment of carpenters employed by both Respondents.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which is found will effectuate the policies of the Act:

(a) Offer Richard Pinnel, Brian Ellis, and Jose Gomez immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent

positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the above Decision.

(b) Upon request, give recognition to and bargain with the Union with respect to the wages, hours, and conditions of employment of Respondents' carpenters who are represented by the Union, and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

(c) At the Union's request, give retroactive effect to the aforesaid 1974-77 collective-bargaining agreement and apply the agreement to the carpenters in the employment of Burgess Construction, and make such carpenters whole for any wage losses they may have suffered from January 1975, with interest at 6 percent per annum, and pay to the Carpenters trust fund referred to in the collective-bargaining agreement the prescribed health and welfare, retirement, and other contributions on behalf of such carpenter employees which became due from January 1975.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at their Fresno, California, facilities, copies of the attached notice marked "Appendix."[12] Copies of said

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[12]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading

notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. January 7, 1977

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in Sequoia District Council of Carpenters, AFL-CIO, or any other labor organization, by laying off employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment because of their union or concerted activities.

WE WILL NOT violate the terms of the 1974-77 collective-bargaining agreement signed by Donald Burgess on behalf of V & B Builders and also binding on Burgess Construction as a segment of the single integrated enterprise comprising both companies.

WE WILL NOT refuse to bargain with the Union with respect to wages, hours, or working conditions or other terms of employment of carpenters employed by us.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization

as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL offer Richard Pinnel, Brian Ellis, and Jose Gomez immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings suffered by reason of the discrimination against them.

WE WILL, upon request, give recognition to and bargain with the Union with respect to the wages, hours, and conditions of employment of Respondents' carpenters who are represented by the Union and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

WE WILL at the Union's request, give retroactive effect to the aforesaid 1974-77 collective-bargaining agreement and apply the agreement to the carpenters in the employment of Burgess Construction and make such carpenters whole for any wage losses they may have suffered from January 1975, with interest at 6 percent per annum, and pay to the Carpenters trust fund referred to in the collective-bargaining agreement the prescribed health and welfare, retirement, and other contributions on behalf of such carpenter employees which became due from January 1975.

All our employees are free to become, remain, or refrain from becoming or remaining, members of Sequoia District Council of Carpenters, AFL-CIO, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

DON BURGESS CONSTRUCTION
CORPORATION
d/b/a BURGESS CONSTRUCTION
AND
DONALD BURGESS AND
VERLON HENDRIX
d/b/a V & B BUILDERS

(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 450 Golden Gate Avenue, 13018 Federal Building, Box 36047, San Francisco, California 94102, Telephone 415—556-0335.

Appendix D

JD-(SF)-175-76
Fresno, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

DON BURGESS CONSTRUCTION CORPORATION d/b/a BURGESS CONSTRUCTION and DONALD BURGESS AND VERLON HENDRIX d/b/a V & B BUILDERS

and Case No. 20-CA-10713

SEQUOIA DISTRICT COUNCIL OF CARPENTERS, AFL-CIO

Stephen M. Koslow, Esq., and *Florence D. Mischel, Atty.*, for the General Counsel.

George J. Tichy, II, and *James J. Meyers, Esqs.*, of *Littler, Mendelson & Fastiff*, San Francisco, Calif., for Respondent Burgess Construction and Donald Burgess.

John M. Shelton, Esq., of *Chinello, Chinello, Maddy & Shelton*, Fresno, Calif., for Respondent Verlon Hendrix.

David Rosenfeld, Esq., of *Van Bourg, Allen, Weinberg, Williams & Roger*, San Francisco, Calif., for Charging Sequoia District Council of Carpenters, AFL-CIO.

DECISION

Statement of the Case

HERMAN CORENMAN, Administrative Law Judge: Based upon a charge filed on October 15, 1975, by Sequoia District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called the Union, and a first amended charge filed by the Union on January 30, 1976, the complaint herein was issued on January 30, 1976, alleging that Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders, herein called Respondents, engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, herein called the Act. By their answers filed herein, the Respondents deny that they engaged in any unfair labor practices.

Pursuant to notice, a hearing was held in Fresno, California, on April 6, 7, 16 and 27, 1976, before the undersigned Administrative Law Judge. Appearances were entered on behalf of each and all of the parties, and briefs were timely filed by the Respondent Burgess Construction and by counsel for the General Counsel.

Based upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of the Respondents

At all times material herein, Respondent Burgess Construction, a California corporation, with its principal place of business located in Fresno, California, has been engaged in the building and construction industry as a general contractor and Respondent V & B Builders, a co-

partnership, with its principal place of business at Fresno, California, has been engaged in the building and construction industry, as a carpentry subcontractor and as a general contractor. During the past calendar year, the Respondents Burgess Construction and V & B Builders each purchased goods and supplies valued in excess of $50,000 originating from suppliers outside the State of California.

The Respondents at all times material herein have been employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

Sequoia District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues—A General Statement*

Donald Burgess is the president and general manager of and owns the controlling interest in Respondent Burgess Construction, a corporation which entered into the building and construction business in May 1974 and signed a collective-bargaining agreement with the Union in June 1974 which by its terms was terminating June 15, 1974. Verlon Hendrix, a union member, became the foreman of the carpentry crew in the expectation that he soon would form a partnership with Donald Burgess to operate as a contractor in the building and construction industry. With the consummation of a renewal master agreement covering

a multi-group of carpentery contractors, Union Business Agent Horn approached Burgess on the jobsite of the Fogg Medical Building at Fresno on August 6, 1974, to sign the new multi-employer carpenter agreement effective June 16, 1974, to June 15, 1977. Burgess declined to sign the agreements, giving as a reason that he no longer employed carpenters. Upon inquiry by Horn as to who was employing the carpenters on the jobsite, Burgess told him it was a newly formed partnership composed of himself and his foreman, Verlon Hendrix. Burgess agreed to and did sign the memorandum agreement on August 6, 1974, on behalf of the partnership, Respondent V & B Builders and with the assent of copartner, Verlon Hendrix. It is undisputed that the Respondent copartnership, V & B Builders, has complied with the terms of the 1974-1977 collective-bargaining agreement with the Union in all respects, including the hiring hall provisions, payment of the proper wage scale, and making the required monthly payments to the Carpenters Trust Fund to cover the fringe benefits such as health and welfare, retirement pension, etc.

In the meanwhile, Burgess Construction functioned as a general contractor and V & B Builders operated as a subcontractor for labor only, receiving its business almost entirely by subcontract from Burgess Construction, in the main by negotiation as distinguished from competitive bidding in competition with stranger contractors. With the transfer of the carpenters, all of whom were union members employed on the Fogg Medical Center jobsite from the payroll of Burgess Construction to V & B Builders in the first week of August 1974, Burgess Construction from that point in time desisted from employing carpenters until approximately 6 months later in February 1975 when it

began to employ nonunion carpenters at wage rates below the union scale, none of whom had been dispatched by the union hall, and for whom no contributions were made to the Carpenters Trust Fund.

On October 14, 1974, Burgess Construction sent a letter "to the Union to clarify that Burgess Construction is not signatory to your agreement." The letter further recited "If you feel you have recognition, please contact me." The letter was addressed to the attention of the Union's executive secretary, Lawrence Null, and was signed by Mr. Burgess. Mr. Null contacted Burgess by telephone and was satisfied with Burgess' explanation that Burgess Construction no longer employed carpenters. Null's investigation also showed that V & B Builders was operating under Donald Burgess' individual contractor's state license and was complying with the union contract and making the payments to the Carpenters Trust Fund. Null concluded that Burgess had merely changed his firm name to V & B Builders, which had already signed the collective-bargaining agreement. Null, in the belief that Burgess would no longer employ carpenters on the payroll of Burgess Construction but only on the payroll of V & B Builders, made no attempt at the time to sign up Burgess Construction and was content to let matters remain undisturbed, namely, with V & B Builders, operating on Donald Burgess' personal contractor's license under union contract and Burgess Construction, no longer employing carpenters, not under union contract.

The General Counsel contends that Burgess Construction and V & B Builders constitute a single employer with common facilities, ownership and common control over

labor relations policies, and are *alter egos*. Hence, contends the General Counsel, Burgess Construction, as the *alter ego* of V & B Builders, is bound by the carpenter agreement of June 1974 to June 1977 in the same manner and to the same extent as V & B Builders; and the refusal to recognize or bargain with the Union and the unilateral breach of the contract terms by Burgess Construction violates Section 8(a)(5) and (1) of the Act. Additionally, the General Counsel contends that the termination of carpenter employees Richard Pinnel, Jose Gomez and Brian Ellis in May and June 1975 by V & B Builders discriminated against them because of their union membership and violated Section 8(a)(1) and (3) of the Act.

The Respondents contend that they are separate and distinct employers and that Union Business Agent Horn as well as Union Executive Secretary Lawrence Null were fully content not to press Burgess Construction into a collective-bargaining agreement, and were satisfied merely in binding only V & B Builders to the agreement because at the time only V & B Builders employed carpenters. The Respondents take the position that if Horn and Null had been more circumspect, they could have guarded against the eventuality that Burgess Construction might sometime in the future employ carpenters by seeking and procuring a prehire contract pursuant to the terms of Section 8(f) of the Act.[1]

[1]Section 8(f) provides as follows:

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Query:

(1) Do the Respondents V & B Builders and Burgess Construction constitute a single integrated enterprise and/or are they *alter egos* so as to bind Burgess Construction to the collective-bargaining agreement signed by Donald Burgess on behalf of V & B Builders?

(2) Did the failure of the Respondent Burgess Construction to comply with the 1974-1977 collective-bargaining agreement in the hire and employment of carpenters on its payroll violate Section 8(5) and (1) of the Act?

(3) Did the layoff of three carpenters by V & B Builders in May and June 1975 at a time when Burgess Construction employed nonunion carpenters, violate Section 8(a)(3) and (1) of the Act?

(4) Does Section 10(b) of the Act bar the complaint herein?

B. *The Partnership*

Burgess and Hendrix formed a building contractor partnership by oral agreement on August 1, 1974. The name of the partnership was V & B Builders.[2] Each of the partners agreed to share an equal 50 percent interest in the partnership and each contributed $250 to the capital of the partnership. In the first week in August 1974, Burgess Construction transferred the carpentry employees from its payroll to the payroll of V & B Builders, and V & B Builders paid their wages. The carpentry employees were not aware of the change in employers till they received their paychecks for the first week in August. On August 6, 1974, Burgess filed a Notice of Change of names with the Contractor's State License Board changing from the style "Donald Lynn Burgess" to "V & B Builders" with residence address at "346 East Brown" (Burgess' residence).

In August 1974 V & B Builders also published a notice of its fictitious business name in an appropriate newspaper and filed the partnership name with the County Clerk.

Monthly health and welfare reports with accompanying payments to the Carpenters Trust Fund previously submitted by Burgess Construction were signed by Burgess on behalf of V & B Builders from August 1974 to January 1975; signed by Burgess' accountant Bob Minyard from February to April 1975 and after May 1975 signed by Verlon Hendrix. V & B Builders' address shown in the aforesaid reports to the Carpenters Trust Fund was shown as 346 East Brown (Burgess' residence) from August 1974 to January 1975; as 191 West Shaw (Burgess' construction

[2]The partnership agreement was not reduced to writing and signed until April 25, 1975.

office) from February to December 1975, and thereafter as 5574 East Swift (Hendrix's residence).

It is evident that the initial $500 capital of the partnership was hardly sufficient to meet the financial needs of the partnership. Hendrix, one of the partners, and who occupied the position of foreman for Burgess Construction on the Fogg Medical Center job at Fresno, conceded by his testimony that, although a partner in V & B Builders, he had no personal knowledge as to where Burgess procured $1500, which he paid on behalf of the partnership to the Carpenters Trust Fund for pensions and health and welfare contributions. Moreover, it is reasonable to conclude that the $500 capital of the partnership was hardly sufficient to pay the wages of the carpenters on the Fogg Medical Center job. Additionally, the creation of the partnership in the midst of the Fogg Medical Center job and the transfer of the carpenters to V & B's payroll without competitive bidding indicates that Burgess Construction and V & B Builders were not dealing at arm's length. The foregoing facts suggest that V & B Builders was unable to function alone and without the aid and control of Burgess Construction. This conclusion is further supported by the fact that Burgess Construction purchased power tools valued at several hundred dollars which were necessary for V & B Builders to perform the necessary carpentry work on the Fogg Medical Center.

The Single Employer Issue

The Respondents contend that Burgess Construction exercised no control over V & B Builders.[3] To support this

[3]The two companies submit separate income tax returns and withholding reports. They currently have separate offices with separate

contention, Respondents point out that V & B Builders' Copartner Hendrix hired, fired, and supervised the V & B Builders' employees, without the intervention of Copartner Burgess. It is pointed out, however, that the labor relations policy of V & B was established by Burgess' signature to the V & B Builders' collective-bargaining agreement. More importantly, the very life of V & B Builders depended on Burgess Construction's decisions to award subcontracts for labor to V & B Builders. In most cases, the subcontracts were awarded to V & B Builders without competitive bids from other contractors. The alliance between the two Respondents is further manifested by the fact that neither bid on jobs in competition with one another. The fact also remains that as a partner in V & B Builders, Burgess, who is president of and controlled Burgess Construction,[4] also exercised joint control over V & B Builders as a matter of partnership law. Indeed, his control over the affairs of Burgess Construction which is the principal source of work flow to V & B Builders, gave Burgess virtual economic control over V & B Builders.[5]

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telephone numbers. Burgess Construction advertises in the "Yellow Pages" of the phone directory only its own name. Currently, Burgess Construction and V & B Builders each purchase their own building and office supplies. Burgess Construction has a workmen's compensation insurance policy in its own name and has not obtained such insurance for V & B since April 1, 1975.

[4]Donald Burgess is president and general manager of Burgess Construction. Under his supervision are two project managers, McKaney and Van Dyke, who in turn supervise the job foreman, Mr. Happeny. The record shows without dispute that Burgess Construction ceased employing carpenters after January 1, 1976.

[5]Thus in the time period August 6, 1974, to March 31, 1976, V & B performed services for others valued as follows:

For Burgess Construction	$145,115
For California State Univ.	5,652
For Pacific Steel Electric	240

It was by agreement with Burgess that Hendrix drew his wages from V & B Builders, and in that respect, Hendrix's compensation was the foreman's wage scale under the union collective-bargaining agreements which Burgess signed in June 1974 on behalf of Burgess Construction and again on August 6, 1974, on behalf of V & B.[6]

Aside from the indicia above outlined manifesting Burgess' control over V & B Builders' operations, fiscal as well as labor relations, there is the additional fact that Burgess as the "qualifying person" for V & B's state contractor's license, held himself out as responsible for the direction and supervision of V & B. When Burgess changed the name of his personal contractor's license in August 1974, from his own name to the name V & B Builders, the name change did not license the partnership. Burgess remained responsible under the California Licensing Law and Regulations for exercising direct supervision and control over the construction operations.[7] By using his personal license for V & B, Burgess held himself out to the

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[6]Hendrix has been a member of the Union for about 20 years. He is paid union scale and although he is a partner in V & B, contributions are made in his behalf to the Carpenters Trust Fund. Burgess draws no compensation from V & B. The record shows that as of March 1976, V & B was capitalized in the approximate amount of $10,000.

[7]Section 7068.1 of the California Licensing Law and Regulations provides as follows: Responsibility of Qualifying Individual: The person qualifying on behalf of an individual or firm . . . shall be responsible for exercising such direct supervision and control of his employees or principal's construction operations as is necessary to secure full compliance with the provisions of this chapter and the rules and regulations of the board relating to such construction operations. [See General Counsel's Exhibit 8(a), page 16.]

State and to the public not only as the responsible qualifying person for V & B, but, because it was a personal license—as V & B itself.[8] The partnership did not apply for a license until September 30, 1975.

Burgess' Misrepresentation Concerning Nonhiring of Carpenters

The conduct of Burgess on August 6, 1974, when approached by Union Business Representative Horn in refusing to sign the 1974-1977 collective-bargaining agreement on behalf of Burgess Construction for the asserted reason that Burgess Construction was no longer employing carpenters, offering instead to sign a contract on behalf of V & B to whose payroll the Burgess Construction carpenters had been transferred, carried with it the reasonable implication that thenceforth V & B, and not Burgess Construction, would employ carpenters. Following Burgess' October 14, 1974, letter to the Union, attention Null, pointing out that Burgess Construction was not signatory to the union agreement and inviting Null to contact him if he felt the Union had recognition, Null contacted Burgess by phone. I find, in accordance with Null's credible testimony that Burgess assured Null that there was no need for a contract with Burgess Construction as "all of his carpenters were on V & B's payroll and that Don Burgess would not be employing any carpenters."

[8]Section 7025 of the California Licensing Law and Regulations defines "Person" to include "an individual, a firm, copartnership, corporation, association or other organization, or any combination of any thereof." [See General Counsel's Exhibit 8(a), page 5.]

The Respondents' contention that Burgess' language to Horn and later to Null meant that merely at the moment Burgess Construction had no carpenters in its employ, smacks of a type of trickery that should not be countenanced. I am constrained to conclude, that no matter what plans Burgess contemplated for the near future, the clear implication of his words to Horn on August 6, 1974, and later to Null shortly after October 14, 1974, was to assure them there was no need for Burgess to sign a contract for Burgess Construction as it no longer was employing carpenters, and such employment would be by V & B. In accordance with his representations, Burgess did in fact sign on behalf of V & B for whose operations Burgess and Burgess alone was responsible under the California Licensing Law at the time.

Evidence that Burgess did ind d secretly intend to employ nonunion carpenters on the payroll of Burgess Construction at the time he represented to Horn and later to Null that Burgess Construction no longer employed carpenters, is supplied by the credible testimony of employees Jack Kuykendall and Ron Sharp, union carpenters previously on the payroll of Burgess Construction who were subsequently in August 1974 transferred to the payroll of V & B. Sharp, whose credibility the Respondents in effect vouched for by making him their own witness, testified that in September or October 1974 he stopped by Burgess Construction's office at 191 West Shaw with respect to a work assignment. On that occasion, Sharp stated to Burgess his understanding that Burgess Construction was going to have a nonunion crew. Burgess agreed that

Sharp's understanding was correct. Burgess told Sharp that there was a possibility that "if it goes through, that he would have benefits, try to be comparable to the Union and if he could get a substantial job—if he had enough people, he could do something like that."

V & B carpenter employee Kuykendall credibly testified in similar vein as Sharp that sometime in October or November 1974, he dropped by the Burgess Construction office to check on when next to report for work. On that occasion, Burgess told Kuykendall that he was planning to set up a nonunion shop and inquired if Kuykendall was interested. Kuykendall asked what the wages would be, and he was told $8.50 with benefits comparable to those under the union contract.

Burgess Construction's plans to employ nonunion carpenters became a reality in late February 1975. Union Business Representative John Horn[9] in a routine inspection, reported to Union Executive Secretary Null in late March 1975 that he found nonunion carpenters working on one of Burgess Construction's projects at First and Bullard in Fresno. The Union let the matter drop when on reinvestigation, the job was found in compliance. On May 1, 1975, the Union, through a routine check, found a nonunion crew on the First and Bullard job.

Because of the Union's discovery that Burgess Construction was employing nonunion carpenters, it picketed the

[9]Horn was not called as a witness. Null testified that Horn suffered a heart attack and had not been in the Union's employ since June 1975.

Burgess Construction jobsite in Fresno from May 6 to 9, 1975, to protest that Burgess Construction was unfair to union members who, Null testified, would have been on the project had Burgess complied with the union agreement.

On July 15, 1975, the Union instituted grievance proceedings against Burgess Construction's employment of carpenters in breach of the carpenter master agreement.[10] Although duly notified, Burgess did not appear before the Board of Adjustment. The designated arbitrator found in favor of the Union by his decision issued January 28, 1976.

On July 18, 1975, Burgess Construction filed an RM petition in Case No. 20-RM-1876 to resolve the representative status of the carpenters in its employ.

After first directing an election, the Regional Director for the 20th Region of the Board in a Supplemental Decision on February 4, 1976, dissolved all previous action on the RM case and dismissed Burgess Construction's petition for an election on the ground that on January 30, 1976, complaint issued in this case alleging, *inter alia,* that the Respondents herein have been *alter egos* and/or a single integrated business enterprise, that all employees of the two concerns performing carpentry work have constituted a unit appropriate for purposes of collective bargaining, and that since April 16, 1975, the two concerns have refused to recognize and bargain collectively with the Union.

[10]The grievance document alleged that Burgess Construction on July 14, 1975, was found "working nonunion men, paying below scale, no fringes and not using the hiring hall" at a jobsite on East Shaw Avenue in Fresno.

Further Findings on Single Employer Issue

Further evidence of the integration of Burgess Construction and V & B is found in the fact that Burgess at times personally supervised the work of V & B carpenters, e.g., the remodeling job on the Robert Duncan residence where Burgess personally supervised V & B employee Kuykendall. Moreover, nonunion carpenters employed by Burgess Construction and union carpenters on the payroll of V & B were frequently assigned to work on the same job, e.g., on the Robert Duncan job, the Gong's First and Bullard job, the Gong's job in Sanger where both V & B and Burgess Construction carpenters worked at the same jobsite intermittently from March 31 through October 20, 1975, and on the Wendy job from February 18 to March 24. Hendrix, although a copartner and manager for V & B, nevertheless performed services on two Burgess jobsites not awarded to V & B, namely, Wendy's and Gong's First and Bullard. I agree with the General Counsel that either Hendrix had been assigned to the work by Burgess or that V & B was so thoroughly integrated with the Burgess operations that this interchange of employees of the two Respondents was made as a matter of course whenever convenient for Burgess Construction.

Additionally, it is noted that Burgess' report to the Carpenters Trust Fund gave his home residence at 346 East Brown as the office of V & B before February 1975 and Burgess Construction's office at 1191 West Shaw as V & B's office from February 1975 to December 1975.

It is also noted that V & B employees Kuykendall and Sharp reported at Burgess Construction's office on Shaw Street for work assignments from Burgess.

The conduct of Burgess Construction in employing nonunion carpenters on its payroll in 1975 resulted in a concomitant reduction in the number of union carpenters on V & B's payroll as is shown from an inspection of the monthly reports of hours worked by employees of V & B filed with the Northern California Carpenters Combined Employer Report of Contributions and the payroll records for Burgess Construction in the same time period.

With the employment of nonunion carpenters by Burgess Construction in 1975, a monthly comparison between the number of carpenters employed by V & B and by Burgess Construction is as follows:

Month	Number of V & B Carpenters Employed	Number of Burgess Carpenters Employed
January 1975	5	2
February	4	2
March	3	3
April	4	4
May	4	4
June	3	4
July	1	5
August	2	5
September	3	6
October	3	6
November	2	5
December	2	8

A comparison of the number of carpentry unit hours worked each month in 1975 by V & B and by Burgess Construction likewise shows a decline in unit hours worked by V & B attended by a progressive increase in carpentry

unit hours worked by Burgess Construction. This is shown in the following table:

Month in 1975	Unit Hours V & B	Unit Hours Burgess Construction
January	652	135
February	466	246
March	485	439
April	524.5	720
May	458	640
June	388	640
July	186	839.5
August	225	742
September	467.5	1042
October	239	828
November	203	718
December	347	1155.5

The above tables demonstrate how Burgess Construction benefited by Burgess' misrepresentation to the Union that Burgess Construction no longer employed carpenters, having transferred them to V & B's payroll.

It cannot be said that by relying on this misrepresentation, the Union knowingly acquiesced in Burgess Construction's operating nonunion. Because in the instant case, the Union acted on Burgess' misrepresentation that Burgess Construction would no longer employ carpenters, this case is clearly distinguishable from *Commercial Gas, Boiler & Heating Co.*, 212 NLRB No. 15, 87 LRRM 1413 (1974) where the Board held that because the Union knew of the existence of the two businesses and had acquiesced in the use of both nonunion and union businesses, the second half of the single employer was not bound to the contract. The instant case is likewise distinguishable from *B & B Industries*, 162 NLRB 832. It cannot be said here, as it was in *B & B. Industries, supra*, that the Union contemplated at the time the V & B agreement was signed by Burgess, that a nonunion company, Burgess Construction, would perform the same work as the Union Company (V & B) with its own carpenters and thus be in a position to jeopardize the rights of the employees of the Union Company to receive the "fruits of the contract." See *Peter Kiewit Sons, Inc.*, 90 LRRM at 2327, n. 16 (C.A.D.C. 1975) *sub nom.* Local 627, *Operating Engineers v. N.L.R.B.*, 518 F.2d 1040 (C.C. Cir. 1975) where the U.S. Court of Appeals for the District of Columbia, in vacating the Board's order of dismissal in *Peter Kiewit*, 206 NLRB 562, held that the two separate corporations constituted a "single employer" on the basis of a "substantial qualitative degree of interrelation of operations and common management—one that we are satisfied would not be found in the arm's length relationship existing among unintegrated companies."

The 10(b) Issue

The charge was filed in this case by the Union on October 15, 1975. Accordingly, unfair labor practices occurring prior to April 15, 1975, are barred by Section 10(b) of the Act which provides "that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

The Respondents contend that within the 6-month period immediately preceding the filing of the charge no unfair labor practices occurred. Although Burgess Construction began employing nonunion carpenters in violation of the collective-bargaining agreement in February 1975, the

Union did not have certain knowledge of this practice until May 1975, when Union Business Agent Horn found nonunion carpenters on a Burgess Construction jobsite in Fresno. The Union picketed the jobsite in May and filed a grievance under the contract in July 1975.

Notwithstanding the fact that Burgess Construction's employment of nonunion carpenters in violation of the union contract first occurred more than 6 months before the filing of the charge on October 15, 1975, nevertheless the Union's unawareness of this fact prevented the running of the limitation statute, until it acquired knowledge in May 1975. *Wisconsin River Valley District Council,* 211 NLRB 222. Moreover, I shall find that the two Respondents constitute a single employer for the purpose of binding Burgess Construction to the contract signed by Burgess on behalf of V & B. It follows that the 1974-1977 union contract was in force and effect at all times after August 6, 1974. Consequently, it became the contractual duty of Burgess Construction, at all times after August 6, 1974, to observe the wages, rates of pay, hours of work, hiring provision and other working conditions provided for in the union contract. This it did not do. Its continued violation of the contract terms amounted to unlawful unilateral action and refusal to bargain within the 10(b) period and amounted to a continuing refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. Moreover, Burgess Construction also refused to bargain by refusing to acknowledge the Union's July 1975 contractual grievance protesting the hiring of carpenters under nonunion conditions in breach of the union contract. See *McCready and Sons,* 195 NLRB 28; *N.L.R.B. v. Strong Roofing & Insulating Co.,* 386 F.2d 929 (C.A. 9, 1967) enforcing 152 NLRB 9; *N.L.R.B. v. White Construction and Engineering Co.,* 204 F.2d 950 (C.A. 5, 1953) enforcing 97 NLRB 1082.

I would find therefore that the Respondents engaged in Section 8(a)(5) and (1) unfair labor practices within the Section 10(b) period. I find therefore that unfair labor practices are disclosed by the record to have occurred after April 15, 1975, and they are not barred by Section 10(b) of the Act.

The Single Employer Finding

As I have indicated in the previous paragraph, I find that Burgess Construction and V & B constitute a single employer for the purposes of this case. Therefore the union contract signed by Burgess on behalf of V & B is also binding on Burgess Construction. I see no need to pass on the question whether the two Respondents were *alter egos.*

In *Radio Union v. Broadcast Service of Mobile, Inc.,* 379 U.S. 812, 85 S. Ct. 876, 58 LRRM 2545, the Supreme Court described the four controlling criteria for determining "single employer" status as interrelation of operations, common management, centralized control of labor relations, and common ownership.

The Respondent cites *Gerace Construction, Inc.,* 193 NLRB 645 (1971), *Frank N. Smith Associates, Inc.,* 194 NLRB 212 (1971) and *Peter Kiewit Sons' Co.,* 206 NLRB 562 to support its position that the two Respondents do not constitute a single employer for the purposes of applying a collective-bargaining agreement on both firms. Aside from the fact that *Peter Kiewit Sons' Co., supra,* was reversed by the District of Columbia Circuit at 518 F.2d

1040 (D.C. Cir. 1975), 90 LRRM 2321, the three cases relied upon by the Respondents' counsel do not possess the element of deceit present in the instant case where Burgess dissuaded the Union from seeking Burgess Construction's signature to the union contract on the representation that Burgess Construction no longer employed carpenters. *Gerace, supra,* is also distinguished, *inter alia,* by the Board's finding in that case that there was an absence of actual or active common control whereas in the instant case, the pervasive control of Burgess is shown over Burgess Construction in which he has a 70 percent interest and over V & B in which he is an equal partner. It was Burgess who signed the union agreement on behalf of V & B and declined to sign on behalf of Burgess Construction for the asserted reason that it no longer employed carpenters. It was Burgess who operated V & B under his personal contractor's license for many months and was hence legally responsible under the licensing laws of California. It was Burgess, the chief executive of Burgess Construction, who controlled every phase of Burgess Construction's operation and who, in the end, determined the life or death of V & B by Burgess Construction's liberality or lack thereof in awarding subcontracts for labor to V & B. Moreover, the Board pointed out in *Gerace, supra,* that there was no showing that Gerace Construction (the union firm) had lost business to Helger (the nonunion firm) or that any Gerace employee had lost work he otherwise would have had. But in the instant case, the record discloses that despite Burgess' implied promise not to hire carpenters, he broke his promise. As a consequence carpenter work waned at V & B (the union firm) and waxed at Burgess

Construction (the nonunion firm) and the number of carpenters at Burgess Construction increased while the number of V & B carpenters decreased. Integration is also shown by Burgess' supervision of V & B employees at times, the reporting of V & B employees to Burgess Construction office for work assignments, the performance of work by Hendrix on Burgess Construction, and the employment of V & B carpenters and Burgess Construction carpenters on the same jobs.

I have found that Respondent Burgess Construction and Respondent V & B constitute a single entity, and under Board law, they are jointly bound to recognize the Union as the exclusive representative of their employees performing carpentry work, and to apply the existing collective-bargaining agreement to those carpentry employees.

This legal principle was stated by the Board in *Peter Kiewit Sons' Co.,* 206 NLRB 562 as follows:

> A company which has not agreed to be bound by the collective-bargaining contract of another company may nevertheless be held to that contract if it is an *alter ego* of the signing company or if it may be said to constitute a single employer with that company.

Inasmuch as the two Respondents constitute a single employer and under the circumstances of this case, a union contract executed by one Respondent is *ipso facto* binding on the other. It thus becomes unnecessary to consider whether the carpentry employees of the two integrated Respondents constitute a single appropriate unit. Such a conclusion necessarily follows from a finding that the contract applies to both Respondents. *Peter Kiewit Sons' Co.,* 206 NLRB 562.

What was emphasized by the District of Columbia Circuit in the *Peter Kiewit* case, 518 F.2d 1040, 90 LRRM 2321, is applicable here. The Court held in *Kiewit* that

> Single employer status, for purposes of the [Act], depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that in addition to the criterion of common ownership or financial control, the other criteria, whether or not they are present at the top level of management, are "controlling indicia of the actual exercise of the power of common ownership or financial control; and that the standard for evaluating such exercise of power is whether, as matter of substance, there is the *"arm's length relationship found among unintegrated companies."* [Emphasis mine.]

The Board used similar language in *Overton Markets*, 142 NLRB 615, 619, noting that the circumstances were not "characteristic of the arm's length relationship found among unintegrated companies," and concluded that the companies constituted a single employer for purposes of the Act.

It is clear in this case that Burgess and Hendrix were not dealing at arm's length. Their carpenters worked on the same jobsites; they did not bid against one another, practically all of V & B's work was obtained from Burgess Construction and most obtained without competitive bids from other contractors.

The Layoff of Three V & B Carpenters

V & B laid off Richard Pinnel and Brian Ellis in May 1975 and Jose Gomez in June 1975. The General Counsel

contends that their layoffs violated Section 8(a)(3) and (1) of the Act. None of these three employees were called by the General Counsel to explicate the circumstances of the layoff, and there is nothing in the record to guide me, other than the payroll record which records their separations. The General Counsel presented no reason for his failure to call these three employees, none of whom have filed charges in this case or endeavored to be heard.

I am aware of the practice in the building and construction industry to lay off employees at the termination of a project. Perhaps that is what occurred here. In any event, the General Counsel has not endeavored to offer any further evidence to establish that the layoffs of these three employees were discriminatory.

The General Counsel argues that because Burgess Construction was expanding its nonunion crew of carpenters, these three employees were consequent laid off. That is supposition but not fact. It could also be supposed that these three union carpenters never chose to return to work at V & B and were in fact dispatched to another job by the Union after the layoff by V & B. The burden of proof rests upon the General Counsel to establish that the layoff of these three employees was discriminatory.

In the absence of proof to the contrary, the layoff is presumed to be for valid reasons. I would therefore dismiss the unfair labor practice allegations of the complaint with respect to the layoffs of Pinnel, Ellis and Gomez.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Respondents Burgess Construction and V & B are an employer or employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Sequoia District Council of Carpenters, AFL-CIO, (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The carpentry employees in the employ of the Respondents constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

4. At all times on and after June 6, 1974, the Union has been the exclusive bargaining representative of the employees in the aforesaid unit pursuant to Section 9(a) of the Act.

5. By failing on April 15, 1975 and thereafter to recognize and bargain with the Union as the exclusive representative of carpentry employees on Burgess Construction's payroll in the aforesaid unit, by failing to honor the aforesaid collective-bargaining agreement with respect to such employees, and by failing to apply to such employees the terms and conditions of that agreement and by unilaterally changing the terms of such agreement, Respondents have violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The unfair labor practices found above are not barred by the limitations of Section 10(b) of the Act.

8. There is insufficient proof that the Respondents committed unfair labor practices in laying off employees Pinnel, Gomez and Ellis.

The Remedy

Having found that the Respondents have committed certain unfair labor practices, I shall recommend that they cease and desist from such conduct and take certain affirmative action which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. I shall recommend that Respondents recognize and bargain with the Union on request; that Respondents on the Union's request, give retroactive effect to April 15, 1975 to the aforesaid agreement applicable to the carpentry employees on Burgess Construction's payroll; that they make such employees whole for any losses they may have suffered by reason of Respondents' failure to apply the aforesaid agreement to them after April 15, 1975 with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716; and that they pay to the appropriate source the contributions due after April 15, 1975 with respect to such carpentry employees as prescribed in the collective-bargaining agreement for health and welfare, retirement, etc.

I shall also require Respondents to post appropriate notices.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Sec-

tion 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

Respondents, their officers, agents, successors, and assigns, shall:

1. Cease and desist from unilaterally violating the terms of the 1974-1977 collective-bargaining agreement signed by Donald Burgess on behalf of V & B Builders, which I have found is also binding on Burgess Construction Company as a segment of the single integrated enterprise comprising both Respondents.

2. Cease and desist from refusing to bargain with the Union with respect to wages, hours, or working conditions or other terms of employment of carpenters employed by both Respondents.

Take the following affirmative action which is found will effectuate the policies of the Act:

1. Upon request, give recognition to and bargain with the Union with respect to the wages, hours and conditions of employment of Respondents' carpenters who I have found are represented by the Union, and are covered by the aforesaid collective-bargaining agreement, and who constitute an appropriate bargaining unit under the Act.

[11]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. At the Union's request, give retroactive effect to the aforesaid 1974-1977 collective-bargaining agreement and apply the agreement to the carpenters in the employment of Burgess Construction, and make such carpenters whole for any wage losses they may have suffered after April 15, 1975, with interest at 6 percent per annum, and pay to the Carpenters Trust Fund referred to in the collective-bargaining agreement the prescribed health and welfare, retirement and other contributions on behalf of such carpenter employees which become due after April 15, 1975.

3. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

4. Post at its Fresno, California facilities, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 20 after being duly signed by its authorized representative, shall be posted by Respondent immediately after, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

[12]In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

5. Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the allegation that employees Pinnel, Gomez and Ellis were discriminatorily terminated, shall be dismissed.

Dated

Herman Corenman
Administrative Law Judge

Appendix JD-(SF)-175-76

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unilaterally change the terms and conditions set forth in the 1974-1977 collective-bargaining agreement with Sequoia District Council of Carpenters, AFL-CIO, which has been found applicable to the Burgess Construction Corporation.

WE WILL bargain with Sequoia District Council of Carpenters, AFL-CIO, upon their request as the representative of the carpenter employees of Burgess Construction Corporation and Donald Burgess and Verlon Hendrix, copartners d/b/a V & B Builders, with respect to wages and hours and other working conditions of their carpenter employees and we will give retroactive effect to the 1974-1977 collective-bargaining agreement at the Union's request and apply it to cover carpenters employed by Burgess Construction Corporation, and we will make such carpenters whole as set forth in the Remedy in the Decision, herein.

DON BURGESS CONSTRUCTION CORPORATION
d/b/a BURGESS CONSTRUCTION and
DONALD BURGESS and VERLON HENDRIX
d/b/a V & B BUILDERS

(Employer)

Dated ..... By .....
(Representative) (Title)

D-32

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Bldg., Box 36047, 450 Golden Gate Avenue, San Francisco, CA 94102.

Telephone: (415) 556-0335

No. 79-172

In the Supreme Court of the United States

OCTOBER TERM, 1978

DON BURGESS CONSTRUCTION CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 596 F. 2d 378. The decision and order of the National Labor Relations Board (Pet. App. C1-C13, D1-D32) is reported at 227 N.L.R.B. 765.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B10) was entered on June 8, 1979. The petition for a writ of certiorari was filed on August 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the carpenters employed by petitioners constituted a single appropriate unit for collective bargaining and that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to apply the collective agreement to all carpenters in the appropriate unit

2. Whether the Board properly tolled the six-month limitation period of Section 10(b) of the Act because petitioners concealed facts showing a violation of the Act from the charging party.

3. Whether the Board abused its discretion by refusing to reopen the record to consider additional evidence proffered by petitioners some six-months after the close of the hearing in the case.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> Section 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

STATEMENT

1. Petitioner Don Burgess Construction Co. ("Burgess Construction") was signatory to the 1971-1974 multiemployer collective bargaining agreement with the Sequoia District Council of Carpenters (herein "the Union") which expired on June 15, 1974 (Pet. App. D3). In early August 1974, Donald Burgess and Verlon Hendrix, who was then employed as Burgess Construction's foreman, formed petitioner V&B Builders (V&B) (Pet. App. D3, D8). Thereafter, all Burgess Construction carpenters were transferred to V&B's payroll and Burgess Construction ceased employing carpenters (Pet. App. D8). Burgess Construction functioned as a general contractor subcontracting work to V&B, which operated almost exclusively on subcontract from Burgess Construction (Pet. App. D4).

On August 6, 1974, Union business agent John Horn approached Burgess at one of Burgess Construction's jobsites and requested that Burgess sign the 1974-1977 multiemployer agreement. Burgess replied that Burgess Construction was not interested in signing the agreement as it no longer employed carpenters, and that the carpenters working on the project were now employed by V&B. When Horn asked whether V&B would sign the agreement, Burgess stated that he would discuss the matter with Hendrix. Later that day, Burgess signed the new multiemployer agreement on behalf of V&B (Pet. App. D3-D4, D12).

In October 1974, Burgess wrote the Union stating that Burgess Construction "is not signatory to your agreement. If you feel you have recognition, please contact me." The Union immediately responded by calling Burgess to determine whether he denied signing the current agreement. Burgess replied that all his carpenters were on V&B's payroll and that Burgess Construction would not be employing carpenters. This satisfied the Union, since

all the carpenters were protected under the agreement with V&B, their wages were as specified in the contract and contributions were being made on their behalf to the Trust Fund (Pet. App. D5, D12-D13).

Burgess Construction employed no carpenters of its own from August 1974 until January 1975, at which time it began employing on its own payroll nonunion carpenters to whom it did not apply the terms of the union contract (Pet. App. C5-C6, D4-D5). Employees of Burgess Construction and those of V&B were frequently used on the same job Pet. App. (D16-D17).

In late March 1975 during a routine check of construction projects, the Union discovered nonunion carpenters working at one of Burgess Construction's projects. A follow-up check several days later showed the project using only union carpenters (Pet. App. D14). On May 1, 1975, through another routine check the Union again found nonunion carpenters working at the Burgess Construction jobsite. Thereafter, from May 6 to May 9 the Union picketed the jobsite (Pet. App. C5, D14-D15).

2. On October 15, 1975, the Union filed an unfair labor practices charge against Burgess Construction, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Pet. App. C4, D2). The Board, relying on their interrelated operations, common management, centralized control of labor relations, and common ownership, found that Burgess Construction and V&B were a single employer for purposes of collective bargaining (Pet. App. C2, D9-D12, D16-D19, D21-D24). The Board further found that the carpentry employees of both Burgess Construction and V&B constituted an appropriate unit, on the basis that "all of the employees possess the same skills, perform the same functions, share the same general working conditions, and usually work at

the same sites" (Pet. App. C2). Accordingly, the Board found that the contract between the Union and V&B was equally binding on Burgess Construction, and that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union regarding Burgess Construction's carpenters and by failing to apply the terms of the contract to those employees (Pet. App. D26, C8). The Board also found that the layoff of union carpenters at V&B at the same time that Burgess Construction was hiring nonunion carpenters was discriminatory in violation of Section 8(a)(3) and (1) of the Act (Pet. App. C3-C4).[1]

In finding these violations, the Board rejected petitioners' contention that the six-month limitation period of Section 10(b) of the Act barred consideration of the Union's charge, finding that Burgess Construction had "fraudulently and deceitfully concealed its unlawful employment of nonunion carpenters from the Union by assuring the Union on two occasions that it would no longer employ carpenters. Thus although [petitioner's] conduct began in January 1975, it was not until May 1975 that the Union, through a routine check, discovered that a nonunion crew was being employed by Burgess Construction" (Pet. App. C5). Applying the doctrine that a statute of limitations does not begin to run until the fraud at issue has been discovered, the Board tolled the limitation period of Section 10(b) until May 1975 (*ibid.*).[2]

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[1]Petitioners do not seek review of this finding in their petition.

[2]The Board denied petitioners' motion to reopen the record, made some six-months after the close of the hearing before the administrative law judge, finding that the motion failed to state a sufficient basis for granting the request (Pet. App. C1 n.2).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A2), concluding that "[s]ubstantial evidence" supported the Board's findings that Burgess Construction had fraudulently concealed its employment of nonunion carpenters and that the Union had not discovered it prior to May 1975 (Pet. App. A8, A9-A10). The court noted that "it is clear that fraudulent concealment tolls a statute of limitations" (Pet. App. A7).

The court also found that the record "amply" supported the Board's conclusion that petitioners constituted a single employer (Pet. App. A15), and that the carpenters employed by petitioners showed a community of interest which made it appropriate to include them in a single bargaining unit (Pet. App. A16-A18).

Concerning petitioners' contention that the Board improperly refused to reopen the record, the court noted that "it was [petitioners'] burden to show the materiality of the proffered evidence and why it was not introduced at the hearing. We agree that [petitioners] failed to meet their burden" (Pet. App. A22) (citation omitted).

ARGUMENT

1. Petitioners urge (Pet. 7-8) that the doctrine of fraudulent concealment should not be applied to toll the Section 10(b) statute of limitation. Petitioners cite no precedent for their view; indeed all the applicable precedent is to the contrary. The doctrine of fraudulent concealment is well established in federal law as a broad equitable exception to federal statutes of limitation. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946). This Court has recognized impliedly that this doctrine is applicable to Section 10(b). *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 362

U.S. 411, 429 n.19 (1960).[3] The Board has consistently applied this principle to the limitation period of Section 10(b), holding that the period does not begin to run until the charging party learns of the unlawful acts which would form the basis for an unfair labor practice charge. See, *e.g.*, *Wisconsin River Valley District Council*, 211 N.L.R.B. 222, 227 (1974), enforced 532 F. 2d 47 (7th Cir. 1976), and cases cited therein. The courts of appeals have uniformly sustained the Board in this view. *AMCAR Division, ACF Industries, Inc.* v. *NLRB*, 592 F. 2d 422, 430-431 (8th Cir. 1979); *NLRB* v. *Allied Products Corp., Richard Bros. Div.*, 548 F. 2d 644, 650 (6th Cir. 1977); *NLRB* v. *Shawnee Industries, Inc.*, 333 F. 2d 221, 224 (10th Cir. 1964); *International Ladies Garment Workers Union* v. *NLRB.*, 463 F. 2d 907, 922 (D.C. Cir. 1972).

Petitioners' additional contention that the Union actually knew of the unfair labor practices more than six months prior to the filing of the charge merely contests the Board's contrary finding. That finding was upheld by the court of appeals (Pet. App. A10). Further review of this evidentiary question is not warranted. *Universal Camera Corp.* v. *NLRB.* 340 U.S. 474, 491 (1951).[4]

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[3]There the court concluded that events occurring outside the six-month period of Section 10(b) could not be used to support an unfair labor practice charge based on acts within the Section 10(b) period which, without relying on such anterior events, could not themselves serve as a basis for finding an unfair labor practice. 362 U.S. at 416-419. However, in a concluding footnote the Court noted: "[i]t need hardly be pointed out that we are not dealing with a case of fraudulent concealment alleged to toll the statute." *Id.* at 429 n.19.

[4]Similarly, petitioners' contention (Pet. 10-11) that its motion to reopen the record was improperly denied merely raises the factual issue of whether on this record the Board abused its discretion in denying the motion. The court of appeals "examined the record * * * particularly carefully" and concluded that petitioners had not met their burden of showing materiality or unavailability of the proffered evidence (Pet. App. A22). Its conclusion raises no issue warranting this Court's review.

2. Petitioners do not dispute seriously the Board's findings, upheld by the court of appeals, that Burgess Construction and V&B constitute a single employer.[5] However, petitioners urge that the Board improperly combined the carpenters employed by the two into a single bargaining unit, and that the Board exceeded its authority by ordering Burgess Construction to honor the collective agreement signed by V&B. There is no merit to these contentions.

South Prairie Construction Co. v. *Local 627, Int'l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976), does not aid petitioners. That case, as the court of appeals pointed out (Pet. App. A15-A16), holds that a single employer finding is not determinative of the issue of whether a single bargaining unit is appropriate. Resolution of the latter issue turns on whether the two groups of employees share a community of interests. *Central New Mexico Chapter*, 152 N.L.R.B. 1604, 1608 (1965); *Peter Kiewit Sons' Co.*, 231 N.L.R.B. 76, 77 (1977), aff'd *sub. nom. Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 595 F. 2d 844 (D.C. Cir. 1979). Here, the Board did not base its single bargaining unit finding on its single employer finding. Rather, the Board found, and the court

[5]Petitioners do maintain, however, that the Board's application of the single employer doctrine somehow conflicts with principles enunciated in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). There is no conflict. In *H.K. Porter Co.*, this Court held that the Board could not order an employer to include in a collective bargaining agreement a provision which the union could not obtain through bargaining negotiations. Here, Burgess agreed to the terms of the collective bargaining agreement. Thus, the effect of the Board's single employer finding is not, as petitioners' argument suggests, to compel the employer to adhere to a provision for which it did not and could not bargain. Rather, the single employer finding merely holds the employer in all its incarnations to the terms of an agreement it willingly entered into.

of appeals agreed, that the Burgess Construction and V&B carpenters showed the requisite community of interests (Pet. App. C2, A16).[6]

Indeed, petitioners do not appear to dispute the fact that the V&B carpenters and the Burgess Construction carpenters share a community of interests. Instead they contend (Pet. 8-10) that the Burgess Construction carpenters were a new group of employees who could not be accreted properly to the V&B bargaining unit. As the court of appeals explained, the doctrine of accretion is inapplicable here.

> Accretion concerns whether certain employees should be absorbed into an existing unit. The issue here is what constitutes the proper existing unit. [V&B] did not acquire [Burgess Construction] nor did it employ [Burgess Construction] to conduct its operations at a different location. Here a single employer, consisting of [V&B] and [Burgess Construction], merely shifted work from the employees of [V&B] to those of [Burgess Construction]. If the

[6]In *Peter Kiewit Son's, supra*, the Board concluded that the two groups of employees did not constitute an appropriate bargaining unit because "the engineers employed by South Prairie in Oklahoma have a distinct and separate community of interests from the employees of Kiewit * * *" (231 N.L.R.B. at 78). There, the two groups of employees worked on separate projects, were separately supervised, and in part performed different tasks inasmuch as South Prairie was involved solely with highway construction whereas Kiewit also engaged in airport, mill and railroad bridge construction. Such distinguishing factors are not present here.

employees of both constitute an appropriate bargaining unit because of their community of interests, there is no need for the Board to concern itself with accretion.

Pet. App. A16-A17 (footnote omitted).[7]

Petitioners' argument (Pet. 5-7) that the Board's order imposes a contract on Burgess Construction to which it had not agreed ignores the Board's findings that Burgess Construction and V&B were a single integrated enterprise and that the union contract was intended to and did cover all carpenters working for that enterprise (Pet. App. D18-D19, A19). Therefore, it is of no significance that Burgess Construction did not sign the contract, for Don Burgess' signature on behalf of V&B was sufficient to bind both V&B and Burgess Construction as a single employer to the union contract covering all carpenters employed by the enterprise in the unit found appropriate by the Board. Cf. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 259 n.5 (1974) (an employer which is the alter ego of its predecessor "is subject to all the legal and contractual obligations of the predecessor").

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[7]The cases cited by petitioner (Pet. 8-9) involve situations where independently established and distinct units of employees are sought to be combined into a single unit. *Spartans Industries, Inc.* v. *NLRB*, 406 F. 2d 1002 (5th Cir. 1969), involved a merger of companies whose employees were represented by separate unions in separate bargaining units. *NLRB* v. *Masters-Lake Success, Inc.*, 287 F. 2d 35 (2d Cir. 1961); *Local 919, Retail Clerks Int'l Association* v. *NLRB*, 416 F. 2d 1118 (D.C. Cir. 1969); *Sheraton Kauai Corp.* v. *NLRB*, 429 F. 2d 1352 (9th Cir. 1970); and *Pullman Industries, Inc.*, 159 N.L.R.B. 580 (1966), involved accretions of new stores, plants, or hotels to existing units at separate, geographically dispersed locations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

DOJ-1979-09

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-172

DON BURGESS CONSTRUCTION CORPORATION dba BURGESS CONSTRUCTION and DONALD BURGESS and VERNON HENDRIX dba V&B BUILDERS,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and SEQUOIA DISTRICT COUNCIL OF CARPENTERS,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

COUNTER-STATEMENT OF THE CASE

The National Labor Relations Board, with concurrence of the Court of Appeals found that Don Burgess Construction Corporation and V&B Builders were a single employer as that doctrine has been explained in numerous Board and Court decisions. (A-10-15 and C-2). Petitioners do not suggest to this Court that that finding should be over-

turned. Indeed, in light of all of the facts, they cannot reasonably attack that finding.

From the finding that these employers were a single employer, the Board's order, enforced by the Court of Appeals, necessarily follows.

II

THERE IS NO REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Each of the four reasons for asserting that the Petition should be granted will be discussed in turn. None of the reasons advanced by the petitioners is substantial in any regard.

A. The Board Properly Ordered the Single Employer to Abide By the Collective Bargaining Agreement

Having found that Burgess Construction and V&B Builders were a single employer, it necessarily follows that both should be ordered to abide by the collective bargaining agreement executed by Don Burgess on behalf of V&B Builders on August 6, 1974. (A-3).

That an employer may be compelled to sign and abide by a collective bargaining agreement was established by this court in *NLRB v. Strong Roofing & Insulation Co.*, 393 U.S. 357 (1969), a principle which has subsequently been followed under numerous circumstances. See *NLRB v. A&H Specialties Co.*, 407 F.2d 820 (6th Cir. 1969); *NLRB v. Raven Industries, Inc.*, 508 F.2d 1289 (8th Cir., 1974); *Southland Dodge*, 205 NLRB 276, enforced, 492 F.2d 1238 (3rd Cir. 1974).

This Court has recognized the "broad discretion to fashion and issue [a remedy] as relief adequate to achieve the end, and effectuate the policies, of the Act." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973). The sole case relied upon by the petitioners is irrelevant for it dealt with circumstances where the Court had imposed the terms of a contract on an employer where there had never been any agreement reached through any negotiations.

It was therefore particularly appropriate to order the single employer to be bound to the collective bargaining agreement executed by Don Burgess on behalf of V&B Builders.

B. The Doctrine of Fraudulent Concealment Is Applicable To the Statute of Limitations Contained in the Act

In their Petition, the Petitioners do not contest the finding of the Board, affirmed by the Court of Appeals, that there was fraudulent concealment from the union of the unfair labor practices involved. They however insist that the doctrine of fraudulent concealment cannot be applied to the six-month statute of limitations contained in 29 USC 160(b).

Petitioners have not offered any reason why this doctrine should not apply to the provisions of the National Labor Relations Act, as this Court has applied it to other statutory provisions. See *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). See also *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977) and *Int'l Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972).

There is no compelling reason for this Court to consider that the doctrine of fraudulent concealment is contrary to a reasonable application. 29 USC § 160(b).

C. A Single Employer Doctrine Was Applicable Since the Employer Has Constituted An Appropriate Unit

In this case, the Board found that the carpentry employees of V&B Builders and Don Burgess Construction "together constitutes a single unit for collective bargaining purposes." (C-2). This finding was reaffirmed by the Court of Appeals. (A-15-18).

Petitioners argue that the Board has declined to find that an appropriate bargaining unit issue in some cases. See, *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977). Petitioners do not however argue that the facts of this case are precisely the facts of that case in which the Board declined to find an appropriate bargaining unit.

Since Petitioners have failed to demonstrate that the Board's finding that the carpentry employees are an appropriate unit was an abuse of discretion, that decision must stand. For, as this Court has pointed out, such a decision regarding bargaining unit "is rarely to be disturbed." *Packard Motor Car v. NLRB*, 330 U.S. 485, 491 (1947).

D. The Board Properly Exercised Its Discretion In Denying the Petitioner's Motion To Reopen the Record

The Court of Appeals below agreed that "the respondents failed to meet their burden" in demonstration why the record should be reopened. (A-22).

This motion filed long *after* the Administrative Law Judge had issued his decision was properly denied since such decisions rest with the Board's sound discretion. *NLRB v. Yale Manufacturing Co.*, 356 F.2d 69, 71 (1st Cir. 1966); *NLRB v. Seafarers Int'l Union*, 496 F.2d 1363, 1365 and *NLRB v. West Coast Casket Co.*, 469 F.2d 871, 873 (9th Cir. 1972).

It is not necessary to comment upon the statements made in the affidavits filed in support of the motion. The statements were marginally relevant to the issues except that of credibility. However, "newly-discovered evidence, the effect of which is merely to discredit, contradict or impeach a witness does not afford a basis for granting of a new trial." *NLRB v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 625-26 (2nd Cir. 1957), cert. denied, 355 U.S. 818 (1957).

CONCLUSION

The peitioners have not advanced any substantial reason compelling the granting of their petition, and it should therefore be denied.

Dated: August 13, 1979

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